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(1824?)

A

LETTER

TO

JOHN LOWELL, ESQ.

IN

REPLY TO A PUBLICATION ENTITLED

REMARKS ON A PAMPHLET,

PRINTED BY THE

PROFESSORS AND TUTORS OF HARVARD UNIVERSITY,

TOUCHING THEIR RIGHT TO

THE EXCLUSIVE GOVERNMENT OF THAT SEMINARY.



Boston :

OLIVER EVERETT, 13 CORNHILL.

1824.





Letter.

DEAR SIR,

On the 17th of the last month, I received a copy of the pamphlet entitled 'Remarks, &c.' from the hands of Dr Ware, sent by yourself, as I understood, with several other copies, for distribution among the members of the immediate college government, and avowed to be your production. Under these circumstances, I have taken the liberty to address directly to you those observations, which occur to me by way of reply to the statements contained in the pamphlet. Though you have not placed your name on its titlepage, yet as you have distributed the pamphlet as your own, as the names of the gentlemen whose statements you controvert, the Resident Instructors here, are before the public, as well as my own in this humble attempt at a reply, I have deemed it every way proper to lay aside the ceremony of addressing an anonymous personage. This course I am the rather led to adopt, as by keeping distinctly in view the character of the gentleman I address, I shall be the surer to reply to his remarks with the respect which is due to him. If in the haste and warmth of the discussion I should seem to fail in that respect, as I trust I shall not, your candor will forgive it as a human imperfection.

The remarks I have to offer in reply to your pamphlet would, under other circumstances, have been published as soon as the mechanical labor of writing and printing them could be performed. That an interval of two or three weeks has occurred is owing to the pressing engagements, amidst which your pamphlet found me, and the indifferent state of my health; the latter of which you will have the goodness to accept as an apology, for a more slovenly performance of this undertaking, than I should otherwise myself have thought due to you and to the subject.

It is my duty also to remark that I am alone responsible for the following observations. I have written and printed them of my own accord. Wherever I speak of and seemingly for my colleagues, the gentlemen with whom I had the honor to be associated in signing the memorial to the Corporation relative to the chartered constitution of that body, I speak only from presumption. Nor is any of them in any degree accountable for the statements I am about to make, except so far as he may have taken or may take some other occasion to sanction them.

In undertaking the task of replying to your pamphlet, I cannot but feel a mingled sentiment of pleasure and of pain. The strong assurance I feel of the correctness of the views contained in the memorial,—views which your pamphlet is designed to controvert,—occasions me a pleasure in finding that no more can be urged, against those views by an individual like yourself. Your long connexion with the college, your acquaintance with its concerns, your sagacity as a reasoner, and your formidable power as a controversial writer, are so well known to me, that I cannot but feel gratified

in finding so little advanced against the memorial, in a pamphlet from your pen. On the other hand, the high private respect which I bear you, and the sincere gratitude I feel for your long continued friendship, cause me some emotions of pain in entering publicly into this controversy. It shall be my endeavor to treat the matter, as much as possible, as an inoffensive abstraction, on which friends may differ.

The first remark, which I beg leave to make, respects the title of your pamphlet, which is the following, 'Remarks on a Pamphlet printed by the Professors and Tutors of Harvard University, *touching their right to the* EXCLUSIVE GOVERNMENT *of that seminary.*' I object to this title, on various grounds. It is a piece of usual courtesy with controversial writers, who are actuated by no personal bitterness, (and none I know is felt by you,) to allow their opponents to avow their own object, at least so far as regards the names, by which they choose that they or their systems should be called. Grotius says, that this is a piece of justice we owe even to Mahometans. Now the only caption to the Memorial is 'to the Reverend and Honorable the Corporation of Harvard University,' and as such I think you ought to have designated it, in the titlepage of your reply. Had you thought it necessary to go farther, and state on your titlepage the object of our Memorial, you ought, in my judgment, to have stated it in the words, in which the memorialists have done it, in their first sentence, words which are italicised in the print, in the obvious design of pointing them out as emphatical. Permit me to quote that sentence. 'The subscribers, resident instructors in Harvard University, beg leave to submit the following statements and considerations, relative to *the mode, in which, according to the*

Charter of the Institution, the Corporation of the same ought of right to be constituted.' With the object of the Memorial so clearly expressed in its first sentence, I cannot deem it just that you should have stated that object in any other terms.

It is certainly only on the supposition that the terms substituted by you were fairly equivalent, that the substitution could properly be made. So far is this, however, from the case, that by the specification in your titlepage, you ascribe to the Memorialists an object, not only neither expressed nor implied in the Memorial, but never, I take upon me to say, so much as dreamed of by one of those who signed it. For the purpose of prepossessing the minds of your readers against the document which you review, you attribute to those, by whom that document is subscribed, an object they never conceived; an object so arrogant and odious, that it is not without the strongest necessity to be laid to the charge of any persons, who have not forfeited their character.

These exceptions to your titlepage are justified by the fact, that you do not, in your whole pamphlet, make a statement to bear it out. You do not attempt to show that our Memorial asserts the right of the professors and tutors 'to the exclusive government of the seminary,' which on your titlepage you avow to be its object. The most you endeavor to prove is, that the professors and tutors claim the right of composing the corporation. Now I shall presently offer some explanations, which will show that much of what you have said on this point might have been spared; and that the Memorialists did not intend merely as professors and tutors to lay claim to the character of members of the corporation. I need here only say, that if they had

advanced this claim, which is the most you assume in your pamphlet, it would not authorize you to say they claimed to be the *exclusive* governors of the college.

I believe I can put this beyond a doubt even in your own mind. You were yourself for many years a member of the corporation; an active, efficient, and valued member. Did you claim, at that time, for the board of which you were a member, the exclusive government of the seminary? Did you and do you hold, that the overseers (without whose concurrence the corporation can do nothing, and who are also in your opinion the visitatorial board) have no share in the government of the college? Would you not have thought it hard, had you written, while belonging to the corporation, a memorial touching your right to be a member of that board, should any one have pronounced it a claim to the exclusive government of the university?

You see, by this time, that it is not a harmless substitution of words, but a heavy and a wholly unfounded charge, which you have brought against the Memorialists; a charge, which you have done nothing to support in the course of your remarks. Though I have made this matter of demonstration, you would justly complain, were I to entitle the present letter, 'Remarks on a Pamphlet published with the design of prejudicing the minds of the public against the Memorial of the Professors and Tutors of Harvard College.' If you might justly complain of a titlepage like this, under the circumstances I have detailed; I may well complain of the wholly unfounded and injurious charge, which is contained in yours.

But I proceed to the pamphlet itself. You observe, in the first sentence, that "although this

for Professors & Tutors
 the Memorial claimed *right to compare*
 Corpⁿ. This body appointed all *officers*
 fix their salaries, & manage funds of college
 - These acts are binding on all *disapproved*
by the corporation

pamphlet purports to be simply a Memorial to the corporation, yet it is in fact an appeal to the whole public, and as such is the fair subject of comment. It is, we believe, rare for memorialists to print their own memorial, *before it has been submitted to the body, to which it is addressed*. The fair excuse might be, that they wished to place a copy in the hands of every member of the overseers; but it is a departure from usage, since *it was competent to the overseers alone* to order the multiplication of copies, if they should deem it expedient, and it is well known to be the common course. We find no fault, however, with the measure, since it has placed it in the power of every friend of the college, to treat it as a public question."

There is some inaccuracy as to facts, in this statement, and more, as I think, as to principle; and as the drift of it is to place on the Memorialists the burden of having made the subject 'a public question,' it is necessary to dwell a moment upon it.—The Memorial was presented to the corporation about the last of March or first of April, in manuscript. In the course of April, it was communicated to you in manuscript by the corporation, and by you made the subject of four or five written sheets of remarks; and *it was printed in the last week of May, about two months after it was in the hands of the corporation*. So inaccurate is your intimation that it was printed before it was submitted to the body, to whom it was addressed. About six weeks after the memorial was submitted to the Corporation, finding that no answer was returned by the Corporation, and no intimation given that any would be returned but the contrary, and it being matter of notoriety, that the Overseers were to meet on very important business, touching the

copy

whole concerns of the College, on the first of June, it was determined to make a written Address to the Overseers, to which the Memorial to the Corporation should be appended. The mode of doing this was left to a Committee of the Memorialists, and knowing the important business before the Overseers, the little probability that a document, which it would take two hours and a half to peruse, would even be read at the meeting, and considering the size of that body, and the manifest impossibility of furnishing written copies for all its members, the Committee determined to print the Memorial to the Corporation, and in that form append it to the written address to the Overseers, to each of whom also a copy was sent.—No part of our written address to the Overseers has ever been printed, except that a quotation from it is in your own pamphlet, it being in your hands as chairman of the Committee to whom it stands referred. Whether this public quotation, in an anonymous pamphlet, of written papers officially in your hands, be ‘a departure from usage,’ I am unable say. I may add to this statement, that though the Memorial was printed, it was not published, nor has a copy ever been sold. It was sent only to the members of the Overseers in the first instance, then to the Corporation by the request of that body. A very few copies, perhaps a dozen and a half in all, have been given to other individuals, mostly on solicitation; some of them to gentlemen, understood to be unfriendly to the Memorial. Under these circumstances, I am not sure that in exposing your pamphlet for sale in the Booksellers’ shops, and advertising it in the newspapers, you ought not, at least, to divide the burden ‘of bringing the question’ before the public.

But I am not prepared to admit, that, even had the Memorialists printed an address to the Over-

seers, before it was submitted to them, they would thereby have been guilty of a departure from usage ; or that ' the Overseers *alone* are competent ' to order the multiplication of copies. I believe that nothing is more common, than for memorials and addresses of considerable length, intended for a large body, to be printed ; often even in the newspapers. It may indeed happen that Memorialists will frequently prefer that the body they address should be at that expense ; and I trust it is no injury to our Alma Mater to have been willing, at a time when her funds are much straightened, to relieve her even from this trifling charge.—As to the intimation, that ' the Overseers *alone* are competent to order the multiplication of copies,' did I not suppose it had fallen from your pen in mere haste, I should pronounce it a most extravagant suggestion. I believe it was never before advanced in this country, that any man or any body of men were not competent to publish any thing they please ; on their peril, of course, if they violate the law of the land. I have not understood that the law of the land forbids the Professors and Tutors of Cambridge University from printing a written document of thirty close pages, chiefly of a historical nature, and making that printed document the part or the whole of a communication to the Overseers, or to any other body in the State, or out of it. There is, I apprehend, but one course, which the Overseers ' are competent to adopt,' if they wish to pass the highest censure on the printing of such a document, viz. *to refuse to receive and consider it*. Did they do this, in the case of our Memorial ? No, Sir ; they received it, and referred it to a most respectable committee, of which you are the chairman. On a document thus referred to you, I will not deny

your competence, as a private individual, to print and publish any thing you might think proper ; but whether, considering you are Chairman of the Committee, to whom the subject is officially committed, the publication of an anonymous pamphlet on the subject containing quotations from the written address to the Overseers, which can only be officially in your hands, be according to usage, I am again unable to say. It is my private opinion, that (unless you have instructions from the Overseers to that effect) not even the whole Committee, far less any one member of it, has a right to publish a word of that written address officially in their hands ; and that your having done so is a just ground of complaint.

Your next subject of remark, which you state as the first objection that occurs in reading the Memorial, is, that “ the present officers of the College should assume such a tone of complaint, and express such a strong sense of injustice.” Again, “ it must therefore excite surprise in all unprejudiced minds, to read the following sentiments in the Memorial, tending to fix the impression of *purposed injustice* on the part of gentlemen, [the Corporation] who had been invited to bestow their time and attention on the concerns of that institution.”—You then quote two sentences, containing together six and a half lines, and conveying the intimation, on the part of the Memorialists, that the present Corporation had gradually formed itself between the Resident instructors and the Overseers, and excluded the former from the exercise of many of its privileges.

Now I appeal in turn to all unprejudiced minds, whether your charge be not wholly unfounded. The Memorial is drawn up with an occasional animadversion of manner, very natural to those who are

deeply convinced and warmly interested; but I hesitate not to pronounce it respectful to the gentlemen of the Corporation addressed. There is no imputation "of purposed injustice." In the course of your remarks you expressly say that our statements are brought forward as "new discoveries." This is not wholly the fact; but if we adduce them as new discoveries, how could we accuse the gentlemen of the Corporation of a *purposed injustice*, in not having acted on facts supposed to be thus newly discovered? But however this be, besides two or three very respectful notices of the Corporation, in the course of the Memorial, its general tone is the remotest possible from any disrespectful intimation. It is true, that in the course of the Memorial, the members of the Corporation, at certain periods, are directly and openly charged with oppressive and unjust conduct. Their order of 1716, that "a Fellow of the house" should be subject to re-election every three years, was grossly unjust and oppressive. It is no matter who enacted it; it was a cruel device to get rid of an obnoxious man, against whom no charge sufficient for his removal could be brought; and the Overseers, in refusing to concur, the first time the Corporation attempted to displace a tutor in virtue of this rule, gave a proof that they also esteemed it unjust. But that the Professors and Tutors of the College of the present day may not comment upon the conduct of the Corporation at any former period, without exposing themselves to a charge like that you now make, I cannot allow.

I pass over some more matter of the same general character, to come on page 7th of your pamphlet, to the first direct counter statement, which you make against the memorial. I will first observe

that it has been charged on the memorial, (justly perhaps,) that it is deficient in technical precision and accuracy. I cannot but regret, however, that in what little precision it has, you have not followed it. The general subject of the memorial, viz. "the mode in which, according to the charter of the Institution, the corporation of the same ought of right to be constituted," is categorically stated in the first sentence. After its having been next observed in the Memorial, that the corporation subsists by virtue of the charter of 1650, which charter in its preamble speaks of the "President and Fellows" of the college; it is stated, that "the first object of this Memorial is to prove that *Fellow*, imported a person *resident at the college and actually engaged there in carrying on the duties of instruction or government, and receiving a stipend from its revenues.*" In support of this proposition four arguments are adduced, viz. 1. Analogy of the English Universities: 2. The form of induction anciently used at Harvard, which was quoted at length: 3. Admission of the fact by members of the corporation: 4. The traditionary possession by the resident tutors of a lot of land bequeathed to the Fellows.

Now whatever error of fact, or flaw in argument, the memorialists committed, this course seems direct and logical, and entitled to be met and answered directly. I maintain that, when it is plainly avowed to be the first object of a document to prove a simple, intelligible proposition, and arguments bearing on that point and no other are adduced and numbered, that it is the duty of a controvertist to meet the question on that ground; or at any rate, not to turn it to a very different point, only deduced by inferences not acknowledged by the memorialists. This, however, you do in the broadest manner. You state, page 7th,

"The claim set up by the memorialists is to the exclusive possession of all the seats in the corporation. Nobody but Fellows, *they say*, are eligible. Every tutor is ex officio a Fellow; and although no professors existed in the college till 1721, yet they maintain, that every professor is also ex officio a Fellow. Nothing supporting this construction can be found in the charter, nothing in the laws or statutes of the university; but yet they contend, that they are *all* Fellows, and that the choice must be confined to them. This is not indeed directly asserted, but it is implied in every part of the memorial."

This, however, is very far from being the real state of the question, which is fairly propounded in the first sentence of the memorial. I am willing to allow, that there is one, and possibly a few other detached sentences, which taken alone, and without any reference to the train of argument, might authorize the inference, that the memorialists claim *as a right*, that all elections to the Corporation be from their number. The last sentence particularly of the memorial states the "claim of the resident instructors to be elected to vacancies," in the board of President and Fellows. But yet, after all the labor bestowed in the Memorial, to prove that the Fellows were required "to be resident at the college and actually engaged there in carrying on the duties of instruction or government, and receiving a stipend from its revenues," it might have been hoped that the leading proposition of the memorial was too obvious to be mistaken. Supposing it proved, that fellows must, by the charter, be resident instructors or governors; and the memorialists being with one exception all that are usually reckoned as such; it will not be thought strange, that they speak of their claim to be elected to places in the Corporation. They did not mean to deny that any person whatever could be elected a Fellow. They

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do not argue to the question, whether one of the resident instructors must be chosen. It is the converse of the position, which they maintain ; that, in the intendment of the charter, the person elected to the office of Fellow must, if he accept it, become a resident instructor or governor. As it is plain, that in almost every case, if this interpretation of the charter were established, some one of the residents would be chosen, the memorial, somewhat loosely perhaps, alludes to it as a matter of course. But that the memorialists should (however loose their language) be really thought to hold, that "every tutor and professor is *ex officio* a Fellow," would seem incredible, unless they are thought to be idiots. The memorial is signed by eleven professors and tutors. To suppose, that this memorial maintains, that *all* the professors and tutors are *ex officio* Fellows, by virtue of a charter, that limits the number to *five*, is to think more meanly of the capacity of the memorialists than, I am sure, you do. —I could have wished you had forborne to charge it upon them, especially by way of inference ; and that too, while you avoid meeting them on the point which they do categorically maintain. That point I will now repeat in a series of propositions, which shall be as clear as I can make them.

1. The general question is as to the mode, in which, according to the charter of the institution, the corporation of the same ought of right to be constituted.

2. By that charter, the College is made a corporation, consisting of a president, five fellows, and a bursar or treasurer.

3. The first object of the memorial is to prove, that "Fellow" imported a person *resident at the College, and actually engaged there, in carrying*

on the duties of instruction or government, and receiving a stipend from its revenues.

But though you have not directly met the third of these points, and though you have left unnoticed many of the arguments adduced in the memorial in support of it, you nevertheless reason incidentally against it; and as this is the only part of your pamphlet, which touches the true question, I shall strive to collect, arrange, and answer all your counter statements on this point.—I will first examine your mode of replying to the arguments, by which that proposition is sustained in the memorial; secondly, I will state and if possible answer such arguments as you bring against the proposition; thirdly, I will state such additional arguments, as occur to me in support of it.

The first argument in the memorial to this point is, that *such is the quality of Fellows in the English Colleges*, at which several of those, who framed the charter of our College were educated. The argument is drawn out at too much length to be repeated, and may be seen on pages 2d and 3d of the Memorial. It is, in brief, that in founding a college here, there is a fair presumption, that the founders used so well known a technical word, as *Fellow*, in the same general sense, in which it was used in the English colleges, in which some of these founders were brought up.—How is this argument answered in your pamphlet? Incidentally, and in the following terms.

“It surely will not be pretended, that by using the word *Fellows*, in the Charter, our ancestors intended blindly to adopt all the *statutes* affecting English Fellows, so as to require subscription to that hierarchy, which they regarded as an abomination; and yet it would be difficult to see on what ground the mere use of a general term, applied to the associates of most other scientific societies should be construed to

limit the choice to resident instructors by analogy to the British usages, and yet reject the other, which are quite as inseparable usages, of celibacy and subscription to Episcopacy."

But the simple question is, what did the founders understand by the term? Something, we presume, they meant, or they would have used neither that nor any other term. If they be admitted then to have meant any thing by the term *Fellow*, the next question is, what did they mean? Now in ascertaining the meaning of disputed words, it is a fair course to reason from the analogy of the time. In interpreting a charter for an American College, framed by men, many of whom had been in English colleges, a fair argument from analogy may be drawn from the meaning of the term in the English colleges, to its meaning in the American. It is accordingly well urged, that *Fellow* in the English colleges means a person resident, entrusted with powers of instruction, or government, and maintained by the college funds; and that, therefore, it may be presumed to have meant something like the same thing in a new college charter, framed at a time, when no other kind of college Fellows are known to have existed.—You attempt to meet this argument, by showing that it proves too much; for that *Fellow* not only imports in the English colleges a resident, but likewise carries with it the obligations of celibacy and episcopacy. It is not pretended, however, by the memorialists, that the strictest *identity* between the English and American Fellows is to be inferred; but only a similarity. The Fellows in many of the English colleges were probably held by their foundations to say mass. This was actually objected to the Fellows of Magdalen, Oxford, by the agent of James II.

When those Fellows stood upon their right to choose their own master ; saying, that their foundation provided that they should choose him ; the king's agent replied, that their statutes also provided that they should say mass ;—and he seemed to think, as you do, that because they differed in one point from their predecessors they might in all. I am, however, willing to leave this argument to the judgment of the unprejudiced, who shall say whether it is probable, that Englishmen framing a charter for a college, and using the word *Fellow*, without any explanation, in the year 1650, could have intended non-resident gentlemen, wholly disconnected with the instruction and immediate government of the college, and receiving nothing from its funds ; and whether it is a fair and sufficient answer to our argument to say, that they could not have intended any similarity with English Fellows, because they did not intend an identity.

It may just be observed, that all those points, in which the English Fellows, since the reformation, differ from those before, and the Fellows of our charter of 1650 from both, are probably connected with the subject of *religion* ; and that no departure was made by our forefathers except in matters affected by the progress of reformation, in which progress they went a little farther than the English church. Thus in the English colleges, founded before the reformation, the Fellows were regular or secular priests, and as such, bound to papacy and celibacy. After the reformation, the first, of course, fell away ; and Episcopacy (as the national communion) succeeded. That the obligation to celibacy was not also removed from the Fellows is probably owing to the fact, that the fellowships in the colleges are connected with livings in the church, to which the

*Fellows in English Colleges are not by
any Law bound to recedency,
—Statutes of the founding sometimes
insert in & in many cases do not
now are they always required to give*

Fellows succeed in order, and which, when attained, furnish the means of supporting a family. In New England, a farther reformation had been made, and Congregationalism succeeded to Episcopacy. As there was no established church with rich livings in reversion for the Fellows, it is equally obvious, that if the fellowships were designed to be made permanent foundations, the injunction of celibacy must here be disused. I make these remarks, merely to show, that the various modifications of the office of *Fellow*, which it *must* have undergone since its primitive establishment before the reformation, instead of being effected by arbitrary statutes from time to time, resting on new views of expediency, are only such as the successive changes in the one great institution of religion have forced upon an office, otherwise essentially unaltered.

The second argument, by which, in the Memorial, the proposition that Fellows were resident instructors or governors was attempted to be proved, is drawn from the form of induction, anciently used, into the office of Fellow. Being of moderate length and of itself, in my judgment, decisive of the question, I shall here quote it entire, in the English translation of it, the original being in Latin. Its title is, "For the Admission of Fellows."

"1. You will give all reverence to the honorable Magistrates and venerable Ministers and President, as overseers of the College.

"2. You will be religiously careful, *so long as you shall here abide*, of observing all the salutary laws of this Society, as much as in you lies, and causing them to be observed by all the members of the College each in his place.

"3. You will be especially careful to *instruct* all the Students *committed to your charge*, or who

may hereafter be so committed, in all literature divine and human, and in all blameless and virtuous manners.

"4. *You will sedulously watch that the College suffer no injury either in its property, its buildings, ITS REVENUES, or other appurtenances belonging, or which may belong unto it, during your residence here.*

"We, then, the Overseers of the College, promise, on our part, that we will not be wanting to you, in any wise; that we will confirm you by our authority and power in your legitimate functions against all opposers; and, *in proportion to the means of the College and in our small measure, we will appoint you stipends, which shall suffice for your food and clothing and the prosecution of your studies.*"

If any one doubt that the persons to whom this ceremonial was administered, were residents at Cambridge, employed in the instruction, government, and management of its concerns, and as such supported from its funds, I must with him resign the argument, for want of common grounds of reasoning between us.—The question is, what was a *Fellow* in the intendment of the charter; and to answer this question, the Memorialists produce the form of admission of Fellows in existence when the charter was given, in which form the points of *residence, instruction, and maintenance* are all expressly enumerated.—Now, how is this argument met in your remarks; in the notes to which you speak of "destroying the *only* remaining prop of the Memorialists?" *You take no notice of it whatever, in the whole course of your pamphlet.* The question being, what was a Fellow in the intendment of the charter, and the Memorialists having

quoted from the college statutes a law, in which various duties belonging to Fellows are enumerated, which law was in force before and after the charter was granted, you pass it over in deep silence in the body of your pamphlet. There is, indeed, on the last pages of your appendix, an allusion to this form of admission, which allusion I have repeatedly read in the hope of extracting from it the precise meaning with which you wrote it. In this I have been unsuccessful; and without any wish to find, I have not been able to escape, the appearance of contradiction between its consecutive clauses. The sentence to which I refer is the following, "There was a form of admitting Fellows in the earlier days. If being a Fellow necessarily made a man a tutor, or if in other words, the term Fellow and Instructor were entirely in their import alike, what was the condition of the instructors or tutors, after the form required by the law of admission of Fellow was given up? Since, whether right or wrong, the corporation *de facto have for one hundred and fifty four years ceased to admit any Fellows*, and since none of the present incumbents pretend to any such election, or that they ever made the very solemn declarations *required by the college statutes* as conditions, how can they be Fellows? The college had an unquestionable right to prescribe rules of admission and subscription on the part of admitted Fellows. *These rules have never been repealed.*"

On this passage I would first remark, that it bears not at all on the argument of the memorialists, which is *not* that they, as instructors, are also Fellows, but that the Fellows ought to become residents. But I propose to examine this passage for a different purpose. It is said; toward the begin-

ning of it, that this form, required by the law of admission, has been given up, and it is by implication asserted, that it has been given up for one hundred and fifty four years. At the close of the quotation, however, it is stated, that the rules of admission have never been repealed. This appears to me inconsistent with the previous intimation. There is only one way of explaining it, which avoids this contradiction. When you say, in the first place, that the form required by law of admission as Fellow *was given up*, you may mean, that though not repealed, it was neglected and disused; and this seems the only interpretation consistent with the concluding remark, that "these rules of admission never were repealed." Supposing this to be the case, you as a lawyer, are better able than I, to pronounce on the conduct of the Corporation in so long neglecting to enforce statutes that date from the origin of the college, statutes on the faith of which the early benefactions to it were wrung from the poverty of the country by solicitations repeated to importunity, and on the faith of which also the State annually paid, what were then esteemed large sums of money for the support of the college. These statutes you say have never been repealed. It is now, by your admission, the unrevoked law of the college that every Fellow shall promise to reside and instruct? Has one of the present Corporation promised this? How then, on your own admission, can either of them be Fellows? The law (for such you call it) *was* binding when passed; for you say "The college had an unquestionable right to prescribe rules of admission and subscription, on the part of admitted Fellows." The law *is* binding, for you say in the next sentence: "these rules have never been repealed."—What then becomes of the

*why not have referred to the Corp. to
repeal this form or remedy of the Corp.
but you mean on July 17th*

right of the present members of the Corporation, chosen in defiance of binding unrepealed laws ?

I return, however, from this digression, to repeat my remark, that though you profess to make thorough work with the Memorial, you pass over in silence this very important argument, drawn from the form of admission of Fellows, to ascertain the nature of the office of Fellow, in the intendment of the charter. You will observe that I say nothing of that form being now binding. Whether it was disused one hundred and fifty years ago, as I understand you say, whether it is nevertheless unrepealed, as you also say, I am ignorant. My own opinion is that instead of being given up one hundred and fifty four years ago, it continued in use till about sixty years since ; but as it is a matter of no importance to this argument, I will not dwell on it. If this form of admission is not repealed, I grant that it might have been at any time, and any other or no other substituted in its place. But what I do urge and that with emphasis, is, that while it was in use, it shows the nature of the office to which it was applied. I do say that no Fellow could subscribe that form, without residing at the college, and without instructing such students, as were committed to his care. I do say, that this form is allowed by you to have been in force till at least twenty years after the charter ; and therefore I infer that you did not answer the argument drawn from it as to the meaning of the charter, because it is unanswerable.

The third argument, by which the Memorialists attempt to prove that " Fellow," by the charter, intended a person residing at college, was the admission of the fact by competent and unsuspicious authorities. Those of the late Rev. Dr Eliot and of the

Corporation of 1812 were quoted. The nature of this argument is as follows. Several years ago and while no controversy then existed on the point, learned men, members of the Corporation or of the overseers are led, in their researches into the antiquities of the country or of the college, to state, without any appearance of uttering a hazardous or doubtful opinion, that Fellow and tutor originally were the same; and this, I maintain, is the very strongest argument from authority that could be brought to bear on this point.—The Rev. Dr John Eliot was universally acknowledged to be as well versed in the history and antiquities of New England and of the college, as any of his contemporaries.—He was a man of singular fairness, he had long been a member of the board of overseers, and five years a member of the corporation, when in 1809, in a treatise on the ecclesiastical history of Massachusetts, he says of Samuel Mather “he was the first, who ever held the office of Fellow, *which then was the same as instructor or tutor.*” I do not mean to ascribe any weight to Dr Eliot’s opinion beyond what belongs to the grounds on which he formed it. But I maintain that an opinion so decidedly expressed by a man so learned in this subject, so impartial, and yet, as a nonresident member of the corporation, so little likely to be swayed toward the views taken in the memorial, is of very great weight in confirming those views. You, sir, as well as I, knew Dr Eliot, and neither of us can believe him a man to broach such a proposition, from his own imagination, or any thing in short but very clear grounds.

Though it does not fall within my design, in *this* part of my remarks, to adduce new arguments in addition to those contained in the memorial, yet I shall, for the sake of clearness, appeal to another

authority, to the same effect as Dr Eliot's. The Rev. Dr Holmes, who stands certainly without a superior, if I ought not to say without an equal in his acquaintance with the antiquities of our country, whose research and exactness are known to all, to whom American history is known, in relating the life of Mitchell, observes in a note, (p. 49, history of Cambridge,) "In the infancy of the Institution, a tutor was *ex officio* a fellow of the college."—Will any one say, that the authority of men like Dr Holmes and Dr Eliot, on a point of ecclesiastical antiquity in New England, a point not then matter of controversy, and with respect to which nothing existed to bias their minds, is not of very great weight?—Is it not entitled to notice? Ought not *some attempt* be made to explain the sources of the error, if these gentlemen have fallen into one?—And yet of Dr Eliot's authority, which was quoted in the memorial as a ground of argument, you take no notice whatever.

But the memorial also quoted the authority of the Corporation of 1812 to the same effect, and you notice this their quotation, as containing an important omission, made as you say, (*italicising the word,*) *probably* by inattention. I will quote the passage.

"From the commencement of the college and for more than half a century, the tutors, who with the president conducted the instruction and immediate government were called "fellows of the college." [So far the memorialists cite the note, but they omit the conclusion, as follows.] After the establishment of the Corporation, there were "fellows of the house or college" and "resident Fellows" and "Fellows of the Corporation." This name is now and has been for more than sixty years, confined to the "members of the Corporation"; "that is, (you add,)

the others have been since discontinued, but the title of fellows of the Corporation has existed from the *very day* of the charter, without a *moment's* interruption."

It is most true that this omission is made in the memorial, but not through inattention, far less with a design of suppressing the conclusion of the note, on account of what it contains. Had this been the design of the memorialists, they would not probably have been so minute in their reference to the passage. I may state however what, of course, does not appear in the memorial, that as that paper was drafted, the whole note was quoted, and the last clause made the subject of detailed animadversion. But as those remarks were of the nature of a digression, tenderness to the name subscribed to the document of the Corporation of 1812, a name, however, as I understand from your pamphlet not accountable for the contents of that document, led to the suppression of those remarks, and the part of the note to which they refer. But I will now say that the part of the note omitted in the Memorial, and quoted with some triumph by you, consists of statements so gratuitous, so loose, and so contradictory, as to excite emotions of regret.—The implication, (for it is not asserted,) that with the charter originated the distinction between Fellows of the house and Fellows of the corporation, is made without a shadow of proof. It is not merely gratuitous, but contradicted by all we know of its history. As to the fact, which you deduce from this note, (as if the bare assertion of an interested party could settle any question,) that the title of Fellows of the corporation has existed from the very day of the charter, without a moment's interruption; that title can never, in any proper sense, be said to have existed *at all*, not even now. It has been more or

less used, in a loose way, especially of late years, and as I still think for the reasons stated in the Memorial, p. 10. But it never was, and it is not now, a title known to the charter. The corporation has no other title, legally, than that of "President and Fellows of Harvard College," and the very phrase "Fellows of the Corporation" is a barbarism. The Fellows cannot be *of* the Corporation; they are the Corporation. They cannot be Fellows of themselves.

The main reason, however, why the Memorial, in its quotation of the note alluded to, stopped short with the admission of the corporation, that for more than fifty years the tutors were called Fellows of the college, was, that this admission was all, that concerned the memorialists. The fantastic device of Fellows of the house, originally contrived to evade the charter, and sanctioned by nothing in it, was of no concern to the Memorialists; and its having been coeval with the charter being intimated without a shadow of proof, as it did not deserve, so it did not receive their attention.—I shall be happy, however, to see an argument to prove that two sets of Fellows were known to the charter, or the earliest practice under it.

With the exception of your remark on this omission, you take no notice whatever of the argument from authority adduced in the Memorial.

The fourth and last argument, to this point, in the Memorial, is drawn from the traditionary possession of a certain lot of land. A small field in Cambridge was very early bequeathed to the Fellows, and was called "Fellows' Orchard." That field, till two years ago, was solely and exclusively possessed and rented by the resident tutors. It was therefore a permanent relic of times, when Tutors

and Fellows were one ; and when funds left to the maintenance of Fellows were applied to that purpose. The argument is overwhelming. It is tangible ; one may go and stand on the lot ; may read the deeds, which give it to the *socii*, and then find a reason, if he can, to account for its being in the *tutors'* hands. Of this argument you take no notice. Is it really so contemptible, that it deserves none ?—I think not.

I have now gone through the four arguments, by which the Memorial supported its first position ; of two of which you have in the body of your pamphlet taken no notice, and to three of which you have made no reply,—except to say, in terms which I regret, that “the whole argument of the Memorialists is founded on supposed analogies and gratuitous conjectures, as to what the legislature might have meant.” The category of “supposed analogies” evidently refers to the argument drawn from the analogy of the English universities. So that you must have intended to give the epithet of “gratuitous conjectures” to the solemn law of admitting Fellows, to authorities like those of Dr Eliot and Dr Holmes, and to the actual transmission, in the hands of the tutors, of real estate bequeathed to the Fellows. This is a mode of discussion which does not meet my views of the laws of controversy.

But I will endeavor, as proposed in the next place, to arrange and answer, as far as I can, your counter statements, wherever they touch the question, which, however, very few of them do at all. As your suggestions are thrown together rather in a loose way, without preserving a regular thread of argument, I may make some unintentional error in performing this part of my task.

The question then, I am constrained to repeat, is, what did the charter intend by the five *Fellows*,

who were to be five out of the seven *persons*, of whom the corporation consisted? The Memorial answers, it intended persons residing at college and employed in its instruction or government. This you deny;

1. Because "no such thing appears in the *tenure* of the office, which is, *not* so long as they should continue to be *resident* at Cambridge and to instruct students," but for life or "*quamdiu se bene gesserint*." Did they forfeit their offices by leaving the town of Cambridge? If such had been the intention, instead of the words "*so oft and from time to time, as any of the said persons shall die or be removed*," would not the accurate writer of that charter have said, "*so oft as any of the said persons shall cease to be instructors in the said College*?"

To this I may reply that, in my judgment, the accurate writer of the charter would have said no such thing, or if he had he would have been a very inexact writer.—There is no dispute, that the tenure of the office of Fellow was for life or "*quamdiu sese bene gesserint*." The Memorialists will go all lengths with you in asserting this. The question is, what is included in *quamdiu se bene gesserint*; what is implied in conducting themselves well? The Memorialists say that it was *redeeming their solemn promise to reside, instruct, &c.* You reply that if this had been designed it would have been expressed. But why? Was it not enough to provide the mode for filling vacancies or *removals*, and leave those competent to it, to decree removals? Was it ever heard of, that every sort of malpractice or nonpractice, by which a trust could be forfeited, should be enumerated in a charter? You intimate yourself that "*residence in the Bay*" is required of the Fellows; and yet there is

nothing said of a new election, whenever any Fellow shall cease to be an inhabitant of the Bay. *Resignation*, of course, would create a vacancy, but on your principle it could not be filled; for the charter only authorizes a new choice when a Fellow dies or is removed, it says nothing of voluntary resignation. I suppose, considering the known character and principles of our fathers, you would grant that becoming a Roman Catholic would disqualify a person from continuing to be a Fellow of a college, consecrated by strenuous protestants to the support of their own religious views. Yet it is nowhere provided in the charter that the office shall be vacated by a conversion to the Roman Catholic faith. The only instances, I believe, in the history of the College of a new choice, made other than in cases of death or resignation, are those of Mr Graves, for becoming an Episcopalian, in the time of President Hoar, and of Mr Prince for intemperance in 1742. But there is nothing said of Episcopacy or of intemperance in the charter. Why then should you single out the qualities of residence and instruction, and maintain that if these had been required of Fellows, it would have been so stated in the tenure of office. Supposing them (as we maintain) to be of the essentials of the office, why are they not sufficiently provided for, under the heads of death or removal? Your argument therefore from the tenure of the office proves nothing, or it proves a great deal too much.

But you attempt to strengthen it by a fact: viz. that Samuel Danforth, one of the Fellows named in the charter, soon after removed to Roxbury, and was there settled as a parish clergyman, and, "it is believed, that he continued to hold his seat till his death, which happened many years after. This is inferred from a minute of the

President in the College Records, in which he notices the death of Mr Danforth, at the time, and adds that he was the oldest member of the Corporation."

You also state in confirmation of this remark, "that in the abortive charter of 1672, the same Mr Danforth is inserted as one of the new Fellows of the College, and is there described as being at that time fellow of the said College, and he is the only person so described."

In a note, you quote from the Roxbury Church Records this minute, "May 12, 1650. Samuel Danforth recommended and dismissed from Cambridge Church and *admitted here*:" being nineteen days before the date of the charter in which his name is inserted as a Fellow. He was ordained at Roxbury 24th Sept. 1650.

I have thus conscientiously given the whole of the facts, which you state to prove that Samuel Danforth continued to be a Fellow twenty four years after his leaving Cambridge, and from which you argue that residence was not required by the charter. The tone of triumph, with which you repeat them, and the singular avowal you make in conclusion, that "you never doubted the Memorialists were mistaken in some of their most essential facts," requires a deliberate examination of this case:—the result may lead you to an opinion somewhat different from that which you now express.

In the first place, then, it is to be observed, that Mr Danforth was a residing and instructing Fellow, before the charter of 1650, probably several years before. I do not know that the date of his election is on record, but as he was graduated in 1643, as Mather relates that "his learning with his virtue ere long brought him to the station of a *Tutor*,

being made the second *Fellow* of Harvard College, that appears in the catalogue of our graduates," it may reasonably be inferred that, when the charter of 1650 was granted, Danforth had been for a considerable time a resident instructor at Cambridge. This is all, on that point, which it behoves the Memorialists to prove. If you maintain that Mr Danforth continued to be one of the five Fellows of the college, after his removal to Roxbury, the burden of proof rests with you. Whether the two circumstances you adduce as such proof, can be fairly so considered, I much doubt. The first is an entry, which you say, you have understood to exist in the college records, made at the time of the death of Mr Danforth, in which he is mentioned as the oldest member of the Corporation. Now Mr Danforth died in 1674. The new charter was granted in 1672, two years before; and in that charter, which, though not finally established, was in some respects adopted, Mr Danforth was the senior Fellow. The circumstance therefore that at his death, in 1674, he was called *senior Fellow*, proves nothing, as to his character and connexion with the college between his removal to Roxbury and the date of the Charter of 1672.

The other circumstance which you adduce is, that in this charter of 1672 he "is described as being at that time Fellow of the said college." This is not strictly accurate. The important words "being at that time," you supply yourself. But he is named as "Samuel Danforth, Fellow of the said college," from which you infer it as certain that he was and had been, during the twenty two years of his residence at Roxbury one of the five Fellows. Were there no reasons for doubting, I should be disposed to allow this to furnish a strong presumption. But

as a sole and unsupported argument, against the whole current of proof to the contrary, I cannot consider it sufficient. The circumstances that he had long been a resident Fellow and that his name is in the first charter, and had stood on the college catalogue with the title of *Socius*, or *Fellow* annexed, will probably furnish the true account of his being styled *Fellow*, in the charter of 1672. Had he been called *Fellow*, because he actually filled that office at the time of giving the charter of 1672, there is no reason why the same title should not have been given to Messrs Brown and Richardson who were both Fellows and Tutors at the time the new charter was conferred :—but being young men might not have been entered as yet in the printed college catalogue as *Socii*. You say yourself “ he is the *only* person described as a Fellow,” which is unaccountable, if you suppose it thereby proved that he was actually a Fellow previous to and at the time of the charter of 1672. Had Mr Danforth, during the long space of twenty four years’ residence at Roxbury, remained a Fellow of the college, it is highly probable that some trace of it would be found on the records of his church, which I presume not to be the case ; since, as they have apparently been searched for you, you would have stated it. A biography of him is contained in the *Magnalia*. The intimate acquaintance of Cotton Mather with our early college history and the particular design of the fourth book, (in which the life of Danforth is contained,) viz. the history of the college, would lead us to expect an intimation of the fact, if it were one ; but no such intimation occurs in his account of Danforth. In the year 1668, Mr Danforth, with five others, was appointed to manage the public dispute with the Anabaptists.

None of the historians, who relate this fact, mention him as a Fellow of Harvard College, which, was, at that time, certainly, if he were non-resident, an honor, which he shared with no one else. In the Dorchester church records, the death of Mr Danforth is mentioned without any notice of his being a Fellow. These circumstances may certainly awaken a doubt, whether so extraordinary a fact is to be admitted, simply in virtue of the title *Fellow*, which follows Mr Danforth's name in the charter of 1672. From this fact alone, you would prove that he had actually been a Fellow during the twenty two years of his nonresidence; whereas, it is quite possible that the title was given him, because he had been a Fellow, and as such was named in the first charter. It is plain that the question must be settled by some proof of his acting as Fellow in the interval. Is there any such proof? I know of none; none is alleged.

A very recent example will show how unsafe it is, to draw inferences of this kind from the use of official titles. In our late editions of the college catalogue, it is stated that Christopher Gore, Isaac Rand, William Phillips, and a number of other gentlemen, were appointed members of the Overseers in 1810; that Mr Gore, Dr Rand, and several others ceased to be Overseers in 1815; that William Phillips and several others still continue to be Overseers. Now here is a much stronger case, than that of Danforth. Here is the college catalogue, published by authority, purporting to give, in one column, the time when the gentlemen were chosen and in another the year when they retired from office. How cogently might it be argued one hundred and fifty years hence, should our contemporary accounts and traditions be

lost, that the gentlemen in question continued to be Overseers from 1810 to 1815, or to the present time. Far otherwise the fact. All the gentlemen named as having become Overseers by the act of March 16, 1810, ceased to be so by an act of February 29, 1812. It is true, they were again restored, two years after, by an act of February 28, 1814; but during two years they were wholly disconnected with the college, notwithstanding the almost irresistible presumption to their continuance uninterrupted till 1815 or longer, which arises from the silence of the catalogue.

It is by this time, I presume, apparent that there is little reason to think, that Mr Danforth continued one of the five Fellows, during his residence of twenty four years at Roxbury; and notwithstanding the paucity of documents in this early period of our history, I shall adduce two authorities which, taken with what has already been said, go very near in my mind to a final decision of the question.

The first is that of Dr Hoar, afterwards President, in a letter written to his nephew, while a student at Cambridge. Dr Hoar took his first degree in 1650, the year of Mr Danforth's removal to Roxbury. In this letter he thus speaks.

"Mr Alexander Richardson's tables would be an Ariadne's thread to you, in this labyrinth, which, with other of his manuscripts in logic, physic, and theology, by transcribing, have been continued in your college, ever since the foundation thereof, among most that were reckoned students indeed. And if you have now lost them, I know no way to recover them but of some, *that were of that society in former times*. I suppose *Mr Danforth*, Mr Mitchell and others have them."*

Here Dr Hoar mentions those, who were Fellows and tutors while he was a student, and who

* Histor. Col. vi. 103.

probably had instructed him, from the manuals to which he refers ; and he mentions them as those, who *were* of that society *in former times*.

The other authority is still more direct. One of the most authentic and valuable works on the early history of our country is Johnson's wonder-working Providence. That Johnson was much versed in the affairs of college, may be inferred, as well from his book, as from his being placed, three years after the time of Mr Danforth's removal to Roxbury, on a most important committee, upon college affairs, as will be seen below.—Of his work one entire chapter, the nineteenth, is devoted to the history of the college, and contains some information, which I do not meet in any other place. In this chapter, I find the following notice of our Mr Danforth, which will probably lead you to reverse your opinion with respect to him.

“ Also the godly *Mr Samuel Danforth*, who hath not only studied divinity, but also astronomy. He put forth many almanacs, and is now called to the office of a teaching elder in the church of Christ at Roxbury, who was one of the Fellows of this college.”*

This, as appears from the next line, was written in 1651, the first year after the charter was granted, and the first after Mr Danforth's removal to Roxbury.—Till some further proof can be brought, on the other side, this settles the question, that Mr Danforth ceased to be a Fellow on his leaving Cambridge.

Your next argument, and the only other one directly to the point in hand, is, that the charter contains no limitation as to persons eligible. It does not provide that the Fellows should be chosen out of the instructors. This I freely grant ; nor was it

* Historical Collections. New Series. vii. 29.

the object of the Memorial, in any degree, to touch that point. It went indeed on the assumption, that, if the charter required Fellows to be resident instructors, whenever a vacancy occurred some one of the latter would, almost as a matter of course, be chosen; because, whoever was chosen must come and reside at Cambridge. That, however, the charter prescribed that some one already resident should be chosen, it is not the drift of the Memorial to prove.

These are all the arguments, which I can find stated by you in form, to prove that Fellow in the intendment of the charter, was *not* a person residing at the college.

I now proceed to the third part of my attempts, which is to state some additional arguments in support of the Memorial, in doing which I shall have an opportunity of noticing every other suggestion and counter statement in your pamphlet, which requires a reply.—I shall also be obliged to repeat a part of what has been stated in the Memorial, with a view to clearness and order.

The question is still then, what was the quality of the five Fellows in the intendment of the charter. And here I must make a reluctant observation, viz. that you appear to me to sneer at the efforts of the memorialists to ascertain the meaning of the charter in this respect. You contrast (page 12,) “the *words* of the charter,” which “are not doubtful,” with the argument of the memorialists, as “to what the legislature *might have meant*.” This looks like a resolution to stand upon the letter, in contempt of the spirit. But I apprehend that when you speak of the “words being not doubtful,” you also must intend the *meaning* of the words; and that if it can be made out, to the satisfaction of the

impartial, that the legislature, in incorporating Fellows, *meant* resident persons, no one will risk the attempt to set up another sort of Fellows, which the charter did *not* mean. I now proceed to the argument.

It is alleged in the memorial, that Fellows were known in the college before the charter. This the preamble to the charter states. It declares that legacies had been left, among other objects, "for the maintenance of the Fellows," and it is expressly avowed *not* in the preamble, but in the body, nay in the enacting clause of the charter, that it is given "for the furthering of so good a work, and for *the purposes aforesaid*." You have labored, and as I think I shall show with great want of success, to prove that these Fellows were, I know not what, titular, academic Fellows, and that there was no authority before the charter of 1650 to create Fellows:—you even say that till the charter of 1650, the college was not properly founded and chartered,—and that there was nobody existing authorized to create Fellows. I believe I shall show that this part of your remarks is wholly erroneous.

In the first place, the college was properly founded. Foundation, in law, I understand to be of two kinds, *fundatio incipiens* and *fundatio perficiens*. The *fundatio incipiens* is the act of incorporation by the government. The *fundatio perficiens* is the dotation or endowment; in which the first donor is esteemed the founder. Now, sir, in each sense, and in all respects, the college had been founded long before 1650.

In 1636, September 8, fourteen years before the charter, the general court bestowed four hundred pounds for a college, and in reference to this, it is stated in the appendix to the document published

by the Corporation in 1812, (and which I understand you to ascribe to the late chief justice Parsons, then the leading member of the corporation,) that "the FOUNDATION of *Harvard College* was laid by the general court of the colony of Massachusetts Bay, in September 1636." Moreover, as this legal act was an appropriation of money, it would seem to combine the qualities of incipient and perficient foundation. It may here also be observed, that the government, being the founder of the college is the visiter of it, unless it has deputed the visitatorial power to some other body; an important enquiry, to which I shall have occasion to revert.

After the foundation of the college and its dotation by the colonial government, it was still farther endowed by individuals among whom Harvard is the most conspicuous.

In 1642 the college was incorporated, by a charter still in force, and which remained in unaltered integrity, till the year 1810; the act, I mean, by which the board of overseers was created. In the preamble to this act, the *foundation* and endowment of the college are expressly asserted in the following terms:—"Whereas, through the good hand of God upon us, there is a college FOUNDED in Cambridge, in the county of Middlesex, called Harvard College, for the encouragement of which this court has given the sum of four hundred pounds, and also the revenue of the ferry betwixt Charlestown and Boston, &c." The overseers, who were created by this act, were not created merely as such, but as *feoffees* (to use the term in the margin of the manuscript colony records, of Governor Winthrop's journal, and of the ancient printed edition of the laws) "to dispose, order, and manage to the use and behoof of the college and the mem-

bers thereof all gifts, legacies, bequeaths, revenues, lands and donations." As these feoffees were a self-perpetuated body, viz. the magistrates and ministers of the six neighboring towns, this act was complete in all the essentials of a charter.

Here then we have the college complete in its foundation and incorporation. The board created by this charter had "*full power and authority* to make and establish all such orders, statutes, and constitutions, as they shall see necessary for the instituting, guiding and furthering the said college," &c. It is true no power is expressly given the overseers to sue or be sued, or have a common seal, but these, it is well known, "*are incidents, which are tacitly annexed of course*, as soon as a corporation is duly erected."*

Now under this charter, and previous to the charter of 1650, there were Fellows at the college, who, with the President, were maintained from its funds. This, in the first place, is asserted in the charter of 1650, for notwithstanding your disparaging remarks on the value of *preambles*, which I shall presently consider, it is not to be supposed that the preamble to the charter of 1650 asserts a falsehood. Now that preamble says, that "many well disposed persons have been and daily are moved and stirred up to give and bestow sundry gifts, legacies, lands, and revenues for the advancement of all good literature, arts and sciences, in Harvard college in Cambridge in the county of Middlesex and to the *maintenance of the President and Fellows, &c.*"

You say, in the face of this, that there were no Fellows before 1650, because the college was then first incorporated. I maintain that it was incorporated in 1642; and the charter of 1650 says that

* Blackstone, I. 475.

foundations had been made for the *maintenance of Fellows*, and that the new act is passed to further that, among other purposes.

To put this matter in a little stronger light, I will here state that the famous "Tutor's lot," or "Fellows' orchard" as it was earlier called, was one of these very foundations. It was given to the Fellows in 1645, five years before the charter of 1650; and though the corporation, some twenty five years ago, refused to let the tutors sell it, the tutors continued to let it on their own account, till a year or two since.

But what concludes this point, and that, as would seem, by your admission is, that it is from this period, anterior to the charter of 1650, that the "*form required by law of admission as Fellow*" (I use your own words) takes its date; that law which, as I understand you also to say, has never been repealed. It was not only enacted by the overseers, but in every instance of its application, must have been administered by them, for the last sentence begins, "*We, then, the overseers of the college, &c.*"

I consider it then as incontestibly proved that, before the charter of 1650, the college was founded, endowed, and administered by a President and Fellows, maintained by legacies and bequests for that purpose, and subject to the revision of the overseers. To further these purposes (for so the instrument *in the body* of it says) a new charter was granted, fixing the number of Fellows to five, and providing for their succession, by election in their own body, and this, with the enumeration of certain powers which are, without specification, incident to corporations, is about all that the charter of 1650 contains.

I have already reviewed the arguments by which it is attempted to be shown, in the Memorial, that the term *Fellow*, in the charter, imported persons maintained at the college. With as little repetition as possible of these, I will pursue the argument. And, first I must insist on the significance of the preamble. You make a remark very familiar, but as I conceive, of little pertinency, that it is a dangerous practice to recur to preambles, to explain the meaning of law-makers,

“Because the preamble was written with less care, and often did not set forth all the reasons, which induced the legislature to make the law, or set them forth imperfectly. Hence the legislators of the United States have gradually abandoned the usage of setting forth, in a preamble, the reasons of their acts, leaving to the courts of law to infer the intent from the enactments and provisions.”

I cannot but enter a protest against this kind of argument, which is altogether *ad ignorantiam*, and wears the appearance of being designed to make the memorialists think, that no argument can be drawn from *this* preamble, because preambles have been drawn with less care than the acts they introduce and are now disused. The only argument of this kind of any weight, would be one deduced from the looseness, imperfection, or inaccuracy of *this particular* preamble. Is any such defect shown? Is it pretended? You call the charter itself full, clear, definite; you say its framers were not illiterate men, that they comprehended the law of corporations, that they did not use language at random; (p. 19) and you again repeat that the charter must have been drawn by an accurate writer.—Where then is the reasonableness of intimating, that a preamble of eight lines, drawn by these learned, precise, and accurate persons is an unsafe ground

of argument as to the intent of the charter? Take away this preamble, and there are but two lines left in the whole instrument, which ascertain the nature of the establishment to be literary. With the exception of two lines in the last paragraph, and those by no means so distinct as the preamble, there is nothing but this preamble, with which you are so unceremonious, to keep the college from being a riding school, a bank, or a woolen factory.

But the argument does not *rest* on the preamble, which, however, you acknowledge to be "a recital of well known facts."—In the body and enacting clause of this instrument, drawn by an accurate writer, versed in the law of corporations, and not using language at random, we read, "It is *therefore* ordered and enacted by this Court and the authority thereof, that for the furthering of so good a work *and for the purposes aforesaid*," &c. Now what are the *purposes aforesaid*? They are "the advancement of all good literature, arts, and sciences in Harvard College, *and to the maintenance of the President and Fellows*, and for all accommodations of buildings and all other necessary provisions, that may conduce to the education of the English and Indian youth of this country in knowledge and godliness." I wish to know whether any thing can by words be made plainer than that the "maintenance of the Fellows" is one of the objects of the charter?

But an argument of still greater weight may be drawn from the phraseology of the charter. In this instrument it is ordered and enacted, by the Court—"that the said *college in Cambridge*, in Middlesex, in New England, *shall be a corporation*." Here there is a peculiarity, as it appears to me, in the choice of the language. The college is *ordered not* to have or to be governed by a corporation,

but to *be* a corporation. This form of words is not preserved in the charter of 1672; but the clause "that the college shall be a corporation" is wholly omitted. Now this use of college is worthy of note. We generally understand by *college* either the buildings or the whole aggregate of the institution, as a system. Here, however, the word is used in a still different, and exceedingly narrow sense, to signify the members of the corporation:—"the said college shall be a corporation consisting of seven persons." Now as the college is expressly defined and fixed to be *at* Cambridge, the corporation must be there. If the corporation are in Boston and Roxbury, as at present, they cannot be the college in Cambridge. If, as the charter says, the corporation *are* the college; wheresoever the corporation is, there the college is; and if the corporation is not at Cambridge, the college is not at Cambridge; and if the college is not at Cambridge, the charter is violated.

If the thing be diligently weighed, I am persuaded it will appear that the residence of the corporation is not only the true intendment of the charter, but is the essence and fundamental provision of it. No one will deny that the college must be at Cambridge. To remove it, would be, *ipso facto*, to break the charter. It may well be a question, whether the temporary removal to Concord, in the time of the war, can be justified on any other ground, than that of necessity superseding law; certainly it is only as a temporary removal, that it could be justified at all. A permanent removal to any place would be the directest contravention of the charter of "Harvard College at Cambridge, in Middlesex County, in New England," as it is twice called in the instrument itself,

with great particularity of location. It being obvious then that the college must be and abide at Cambridge, the question is all important, what the college is defined to be in the charter ; to which of the abstract ideas, attached by popular use to the word *college*, does the charter technically give that name ? Is it the college buildings ? No ; and if it were, the charter has lately been violated in erecting a new building and establishing one whole department in Boston. Is it the body of instructors, who are defined to be the college in Cambridge, in Middlesex ? No ; and if it were, the charter would be again violated, since more than a third of the instructors live in Boston. What then is defined to be the college in Cambridge ? *precisely the corporation*, "The said college *in Cambridge, in Middlesex, in New England*, SHALL BE *a corporation*, consisting of seven persons, to wit," &c. The English language does not possess terms, by which two ideas can be more effectually predicated of each other, than those, by which the "*college in Cambridge*" is here predicated of "*corporation*," and the "*corporation*" of the "*college in Cambridge*." It is not merely said, as in the charter of 1672, that certain persons shall be the corporation. It is not said, the college shall be governed and administered by a corporation. It is said, in the shortest and the plainest terms the language admits, that "the college in Cambridge shall be a corporation." Since then the corporation are the college ; they must reside at Cambridge, or they cannot be the college at Cambridge. Whithersoever the corporation travels, the college travels with them ; because, says the charter, the college is the corporation. If the corporation, as at present, be in Boston and Roxbury, the college in Cambridge

has ceased to exist, unless indeed it can be in two places at once.

It will not probably be denied, that if the word *residing* had been used in the charter, *residence* would have been a necessary qualification of Fellow. And yet this word *residing* must be supplied by irresistible inference. The *college* is specified to be the college *at* Cambridge. If by college were understood the college buildings, the word to be supplied would be *erected* or *standing* at Cambridge. If the college be considered as a *person*, a *corporate body*, then the word to be supplied is *residing* at Cambridge. The only way in which a corporation of men can be said to be *at* a place, is by usually residing at it.

I can foresee how this argument will probably be met ;—by an attempt to avoid the direct terms of the charter, and substitute something in their place. It will be said, that the charter did but incorporate the governors of a college ; which college was at Cambridge. This, however, is in direct contradiction of the words of the charter, which says nothing of governors, directors, or trustees, but beginning with “the college at Cambridge,” orders and enacts that said college at Cambridge *shall be* a corporation consisting of seven persons. It would be a waste of time to insist further on the force of such a language ; or to attempt to prove, that where a college is made to be a corporation, that college cannot be in Cambridge, unless the corporation is in Cambridge. The simple rules of grammatical interpretation require this ; but when we add that we have to do with a legal instrument, drawn by a learned and accurate writer, versed in the law of corporations, the inference is, of course, irresistible.

It is another very strong consideration in favor of the doctrine of the Memorialists, that on that doctrine alone rests the subjection of the corporation to a *visitatorial* power without itself. As the existence of that power is unquestioned, the only interpretation of the charter on which it can rest, viz. that of the Memorialists, should be equally unquestioned. By the charter, as understood by the Memorialists, one of the declared objects of the incorporation is the maintenance of the President and Fellows; and they are empowered to take and hold for their own use and behoof in the service of the college. By the law of eleemosynary corporations, therefore, some person or body, without this corporation, is entrusted with the visitatorial power. But if the trustees do *not* take and hold for their *own* use, behoof, and maintenance, but in trust for others, then the trustees are visitors. If the Fellows of the corporation hold the college stock not for their own maintenance in the service of college, but that of others, call them what you will, then the Fellows themselves are visitors. No point of law is better established than this, from Lord Coke's time to the modern decisions.* In Mr Webster's speech on the Dartmouth College question, the array of authorities is produced, and the principle is declared in his opinion to "be settled and undoubted law."† The same opinion from the same high source is expressed in the debates in the Massachusetts Convention. By this principle the corporation, as now constituted, would be the visitors of the college: and so clear was the distinguished jurist, whom I have just quoted, of the principle in question, that (taking the now pop-

* 10 Coke's Reports. p. 31.

† Dartmouth College Case. p. 253.

ular construction of the charter as the true one) he does not hesitate, both in his speech on the Dartmouth College case and in the Convention, to express the opinion that the *corporation* are the *visitors* of college. This however, sir, is not your opinion, you expressly call the *overseers* the *visitors*; and others of equally high authority conceive the visitatorial power to be reserved to the founder, viz. the State. And yet the authorities cited by Mr Webster, not less than his own, prove that if the corporation are merely non-resident trustees they are *visitors*; if they reside and are supported by the college funds they are not *visitors*. These principles, as they are undoubted law, as they were solemnly so decided in the case of Sutton hospital in 1613, and as they were emphatically reported by Lord Coke the following year, in the tenth book of his reports, must have been fully known to the accurate writer, well acquainted with the law of corporations, by whom the college charter was drafted. And now I follow you in appealing to gentlemen conversant with judicial enquiries, whether it is not a most extravagant pretension that a corporation shall have a right, by a mere bye-law, to change their constitution in the fundamental point of the visitatorial power; to make themselves *visitors* instead of *objects* of a charitable foundation; to apply funds, which the Fellows were incorporated to employ, among other things, in their own maintenance in the service of college, to the maintenance of another order of men. For this is the tenure on which *all* the general funds of college are bestowed, as much the latest as the earliest donations, it being an equally established principle, that "a subsequent donation, or engrafted fellowship falls under the same general visitatorial power, unless

otherwise specially provided." It is one of the most obvious principles of the law of corporations, "that a bye-law may regulate, or modify the constitution of a corporation, but cannot change it."* But surely no one will deny that to change the Fellows, from a body of persons incorporated to be maintained in the service of the college, to a body of Trustees; to take the visitatorial power out of the hands, where it would otherwise rest, into their own, is to alter the constitution of a corporation. It is to alter it in a most essential feature.

But this is not the only essential alteration in the constitution of the college, which results from the choice of non-resident fellows. While the corporation was composed of resident Fellows, maintained in the service of the college; instruction, government, and administration were in the same hands. I speak not now of the expediency of such an arrangement, but of the fact. From this arrangement would result several very important franchises. The Fellows, being instructors, might require the assistance of certain books, in their courses of instruction. They would be able to purchase them for the college library, out of the college funds, subject to the approval of the overseers. Their experience as governors of the college might show them the necessity of some new law. They would have power to pass it, subject to the revision of the overseers. The harmony and success of their service of the college might depend on their being associated with colleagues of their own preference. They would have power to choose such, subject of course to the revision of the overseers. Nay more, appointments of responsibility, honor, and profit are within the gift of the fellows; the

* Kyd on Corporations. ii. 113.

election of the president is within their control; they may choose one of their own number, and the non-resident fellows in the last century actually formed the habit of doing it. Chief Justice Marshall, in his opinion on the Dartmouth College question, says, "according to the tenor of the charter [of Dartmouth College] the trustees might, *without impropriety*, appoint a president and other professors from their own body. This is a power, not entirely unconnected with an interest." By the charter of Harvard College, the Fellows have the same beneficial interest, the same vested right. If the Fellows reside and instruct, then those, by whom instruction is given, possess all that advantage, respectability, weight, and influence, which resides in this beneficial interest;—in the power of choosing without impropriety, themselves or others to confidential and important trusts. No corporation in the State, at this moment, possesses so valuable a patronage as the corporation of Harvard College. To place that patronage within the college walls, giving dignity and character to its administration; and to carry it away from the college walls, to take it out of the hands of those, on whose respectability and efficiency the whole effect of the system as a place of education must rest, are surely very different things. To change from one to the other is surely a fundamental change in the constitution of the college. It is to take from the residents a very valuable property, a very important vested right. And I do apprehend that merely on loose notions of expediency, addressed in popular appeals to the community, the very importance and value of a right will not be made the ground of taking it away. It may be thought dangerous to the college welfare, that men like Dr Ware, Dr

Hedge, Dr Popkin, Mr Willard, and Mr Farrar, should be trusted with the selection of a person to fill the vacant chair of moral philosophy or the Latin tutorship; and it may be thought safer that this should be done by Mr Otis, Mr Prescott, Dr Porter, and Dr Channing. But still, if the charter intended to unite the honorable labor of instruction with the honorable trust of electing to offices in the college, then I apprehend that, in a government of laws, this important franchise cannot be taken away, on grounds of expediency.—These rights and franchises are the only privilege of what the great man, from whom I am proud to quote the sentiment, has called “a most deserving class of men, those who have devoted their lives to the instruction of youth.” You are pleased to speak of their title, their rank, their honorable salaries, and pleasant duties, as great things. What you would intend by their title and rank I know not. Their salaries are less than those in the professions considered on the same footing, and are now threatened with a reduction, which will leave them barely adequate, with economy, to the support of a family at Cambridge. As for the *pleasant duties*, with which you taunt us; if you will come here, sir, in a time of a high combination; if you will sit with us eight, ten, twelve hours a day; find yourself constrained, as you think, in duty, to inflict the severest censures on young men, many of whom you respect and love; obliged to meet the remonstrances of their parents and friends; to pass days, and weeks, in a state of the intensest anxiety, and know that for it all, your reward is to be certain odium; if you will do this you will perhaps say less of our *pleasant duties*. A very considerable part of the business here is far from pleasant.

And there is not a body of men, as I think, in the world, to whom you ought more willingly to grant every privilege, to which they are any way entitled. So far from this, all the confidential and important trusts connected by the charter with the office of resident Fellows have been taken away. By slow degrees, they have been deprived of one seat after another in the corporation, till for the last eighteen years, the entire control of the college has been carried from its walls and monopolized by the leading gentlemen of Boston. Have they not enough without this?—Or if the gentlemen desire to have a part in the administration of college, is it not enough that every one of the *Fellows of the Corporation* is now actually a member of the board of overseers, where they may approve, and have by their casting votes in that board approved, their own votes as members of the corporation? And will they, above all, contend that this change of the constitution, this disruption of the duties and trusts united in the character of resident Fellows, this transportation of the corporation away from the place where it was appointed to be, that all this is no departure from the charter; this it is only a little affair of bye-laws which leaves the constitution of college unaltered?

At the risk of seeming to labor on a point proved, I must ask permission to make an observation on an argument adduced in the memorial, and controverted by you: It is stated in the memorial, that “the very order of the words, in the charter, opposes this singular interpretation of its provisions. It does not say a president, a treasurer and five *other* Fellows; (or members;) but it says a president, five Fellows, and a bursar or treasurer. Moreover, in thus making *Fellow* to signify no more

than member, the corporation is made to consist of seven Fellows, instead of five. The president and treasurer are, by the charter, members of the corporation, and if *Fellow* imports only *member*, then there are seven Fellows, contrary to the provision of the charter, which limits the number to five."

You first attempt to throw discredit on this reasoning, by speaking of it as "verbal niceties or subtleties mingled with more sober argument," and as a piece of "refined criticism." It is somewhat unexpected to me, I confess, to hear that verbal subtlety is opposed to sober argument, or that refined criticism is out of place, in interpreting a legal instrument drawn by an "accurate writer." If there exist on earth any thing, which will bear refined criticism, I should think it was such an instrument; and I doubt whether "the intelligent part of the public, especially those conversant with legal inquiries," will bear you out, in your implied preference of a loose over a subtle or refined interpretation.

It is, however, a little curious that in quoting an instance to show the fallacy of the latter part of the argument of the memorial just cited, you have adduced the amplest confirmation of the soundness of the first. It is observed, in the memorial, that "the VERY ORDER of the words in the charter opposes this singular interpretation; [that Fellow meant only member.] It does not say a president, a treasurer, and five *other* Fellows, (or members;) but it says "a president, five Fellows, and a bur-sar or treasurer." To meet the other part of the illustration in the memorial, you say "a religious body is incorporated by the name of the rectors, wardens, and vestry.—All these persons are equally members of the corporation, but the vestry are not

wardens, nor the wardens rectors, nor the rector and wardens vestrymen."—Granted : and what do we observe in the order of the words ? Do not those members of the religious incorporation who, besides being members, are something else, stand first in the enumeration ? It is not rector, vestrymen and wardens. Your case requires that the corporation of the college should have been styled president, treasurer, and Fellows. That was the very argument of the memorial, and to meet that argument, you bring a case which confirms it in the amplest manner.

But I have further reason to thank you for that case. Suppose that before any other church had ever been incorporated or even established in America, a charter were granted in 1650, by which it was ordered that Trinity Church in Boston should be a corporation consisting of a rector, five vestrymen, and wardens. Suppose that in the English churches, vestrymen were usually resident within the cloisters of the church. Suppose farther that, previous to this charter, a body of Overseers appointed by law had established certain vestrymen, to reside within the cloisters of the same church and discharge its functions, and that legacies had been bequeathed to maintain such resident vestrymen. Suppose the charter in its preamble to recite these "well known facts," and to set forth that it is itself granted for the furtherance of *the same objects*. Suppose it accordingly enacted by the charter that said church in Boston *should be* a corporation consisting of a rector, five vestrymen and wardens. Suppose that of the vestrymen named every one was at the time resident within the cloisters ; and finally that the general court, at a subsequent period, should irregularly enact new charters, under the temporary operation of which, the power should get into the hands of non-residents, who to perpetuate it there,

and yet seemingly to save the charter, should set up a distinction of vestrymen of the church and vestrymen of the corporation ; - that these latter should not reside even in the town of Boston, and yet claim and exercise all the higher powers of the body. I wish to know whether all this would not be thought a gross departure from the constitution of the church ; an introduction of a new body unknown to the charter, a degradation of the real vestrymen, a total change of the principle on which the church was incorporated, which was that those who did service in the cloisters should be made respectable, by being clothed with responsible powers. Here is a parallel case, and to the judgment of every fair man upon it, whether conversant with legal enquiries or not, I am willing to leave the determination of the whole matter.

I will here briefly notice some observations of your's relative to an expression occurring incidentally in the Memorial, to which you have thought necessary to allude in two or three places. It was argued, at the close of the Memorial, that for the vigorous execution of their duties, the immediate government need to be clothed with *greater responsibility than they can have*, as mere "servants of the corporation."—This phrase is not at all dwelt on in the Memorial ; no use is made of it, except in this one incidental allusion, and what I beg particularly to have noticed, it was marked with inverted commas, to intimate that it was a quotation. Without pretending to assert the fact, and very willing to confess the error, if it be one, I am not the only one of the signers of the Memorial, who understand it to have been an usual thing for the immediate government to be called the "servants of the corporation," by the corporation themselves. This therefore is not

a name, which the memorialists, as you intimate, for invidious purposes, fix on themselves. Neither is it a name of which they complained. The allusion was slight, and intended to be good humored. You have thought necessary to dwell upon it ; to bring it to view at three different times ; and what I have a right to call unjustifiable, to make it the ground of twice calling in question the *feelings* of the memorialists. You have said, " No, that expression was misplaced. It was the proof of some *feeling*, that should have been concealed." In reference to this, I would remind you of the rule either of Dr Franklin's club or that of the Spectator, that " no member should call his brother member's motion *strange* or *extraordinary*." By a still stronger delicacy, I think no controvertist should say that his opponent has given proof of feelings, which ought to be concealed. The arguments of the memorialists are fair game ; their *feelings*, as I conceive, like those of other men are *sacred*, till they forfeit their character and standing. Of my own, I will not presume to say anything. But of the other subscribers to the Memorial, I must be permitted to say, that I am well persuaded their feelings, on every point touched in the Memorial, were such as need no concealment. Some of them are older than you or I, and their feelings are entitled to all the tenderness due to hairs which have grown grey in the service of the community.

An argument was drawn in the Memorial from the variations of the charter of 1672, from that of 1650. In this charter certain non-residents were named as Fellows ; and it was intimated in the Memorial that the new charter was procured to give a legal sanction to their title. You observe of this, that it " is matter of regret, that such an argu-

ment should have been used, and that suggestions affecting character should not be hazarded without the fullest proof." Neither should an opponent be censured for the very thing we practice ourselves. The college in 1672 and 1673 was very much reduced, and in the former year there was no class graduated. You mention (p. 11.) the dwindling of the college and the introduction of a majority of non-residents into the new charter, as a proof that the administration of the resident Fellows up to that period was neither successful or popular. This is a grave charge against the men, who in the infancy of the institution discharged the laborious office of instructing and governing it. It appears to me one of those "suggestions affecting character, that should not be hazarded without fullest proof." The period of sixteen or seventeen years of President Chauncey's administration, the period immediately preceding the new charter, which was granted in the year 1672, is one of uncommon respectability, as far as the immediate instruction and government of the college went. President Chauncey himself was one of the most learned men of any age, and indefatigable in his office. Cotton Mather relates that

"After age had enfeebled him, *the Fellows* of the college once leading this venerable old man to preach a sermon on a winter day, they, out of affection unto him to discourage him from so difficult an undertaking, told him, *Sir, you will certainly die in the pulpit.* But he, laying hold on what they said, as if they had offered him the greatest encouragement in the world, pressed the more vigorously through the snow drift, and said, *how glad should I be if what you say might prove true.*"

This is the head of that *unsuccessful* and *unpopular* administration of college. The real causes, as I understand, of the decline of the number of stu-

dents about this time were various. The old college was ruinous, and in this very year, 1672, was pulled down and rebuilt. This may possibly be the reason that there was no commencement this year. President Chauncey's death may have contributed to the same effect. Great agitations existed in the churches, relative to baptism and consociation. In 1670, a violent controversy arose on account of Mr Davenport's call to the first church in Boston, which according to Hutchinson "produced two parties, not in the churches only, but also in the State;" and was finally taken up by the general court, whose committee on the subject denounce the evils complained of as "leaven, the corrupting gangrene, the infecting spreading plague, the provoking image of jealousy set up before the Lord, the accursed thing, which hath provoked divine wrath, and doth further threaten destruction." Add to this that the troubles with king Phillip began, at this time, to threaten; and I think you will have causes enough for any apparent decline of the college previously to the election of Dr Hoar in 1672. After that election, the following extract from Cotton Mather will inform us, whether it was incompetency on the part of the Fellows, or interference from without, that affected the prosperity of the college.

"Were he considered either as a scholar, or as a christian, he was truly a worthy man; and he was generally reputed as such, until happening, I can scarce tell how, to fall under the displeasure of *some that made a figure in the neighborhood*, the young men in the college took advantage therefrom to ruin his reputation as far as they were able.—The young plants turned *cud weeds*, and with great violations of the fifth commandment, set themselves to travesty whatever he did and said, and aggravate every thing in his behavior disagreeable to them, with a design to make him odious; and, in a day of

temptation, which was now upon them, several very good men did unhappily countenance the ungoverned youths in their ungovernableness. Things were at length driven to such a pass, that the students deserted the college, and the Doctor on March 15, 1675, resigned his presidentship.

Thus much for the want of success and popularity on the part of the resident Fellows.

You endeavor to convict the Memorialists of absurdity in arguing, that the non-resident Fellows procured the charter of 1672, to cover the defect of their title, and after obtaining it did not accept it, but declined acting under it. But the Memorialists do not say, that the charter was never accepted. They say "its history is obscure, that many of its most important provisions appear never to have gone into operation." But in order to preclude any argument drawn from it by the corporation or their champions, the Memorialists subjoin the remark, that, "in the appendix to the collection of documents published in 1812, it is observed, 'that there is no evidence that the President and Fellows ever accepted this charter or acted under it.'"—These are the words of the document, which I understand you to ascribe to Chief Justice Parsons. If this be the document, to which you refer, you are not correct in your report of it. You say, "the late Chief Justice Parsons, after full research into the history of the college, *asserts this to be the fact*" (that the charter was not accepted nor acted under). But the Chief Justice is much more guarded in his language. He makes no stronger assertion than that, "there is *no evidence* that the President and Fellows ever accepted this charter." This is true, but there is no evidence that they rejected it. There is no evidence on either side. In another document in the same appendix, also probably

written by the Chief Justice, it is said, that "the new charter is not on the records either of the overseers or corporation." This also I take to be correct. But you make the chief justice say, (if it is this passage you allude to, and you must excuse the error if I err, as you give no reference,) that "the corporation never recorded the charter of 1672." This the chief justice does not say: and if, as I believe, the records of the Corporation, at that period, are not extant in the original, and only in an imperfect copy, there is good reason to say that it is not on the records; but very little to say that "they never recorded it."* Whether they did or not, they preserved it, and it is now kept by the president of the college, I believe, and in the same place of deposit with the charter of 1650.

In confirmation of the interpretation given by the memorialists to the charter of 1650, they urged that the charter of 1672 differed from it in those parts, by which the residence of the Fellows was enjoined. They observed that "the old charter ordered that the corporation should consist of "a President, five Fellows, and a Treasurer." The new charter omits this specification wholly, and merely enumerates the persons, who shall be the President and Fellows respectively."—You have appended a note to your pamphlet, for the sole purpose of controverting this statement; and wind it up with suggesting, that the memorialists probably omitted to read the whole charter. Your words are, "The memorialists are not quite correct in saying that 'the charter of 1672 omits the *specification of five Fellows*, and a Treasurer, and merely enumerates the persons, who shall be President and Fellows res-

* The records of the *Overseers* first began to be kept in 1707; a good reason for their not containing the charter of 1672.

pectively.'—The charter (of 1762) distinctly declares that the President, Fellows, and Treasurer or the Fellows alone, when there is no President, shall be the immediate governors.—*There is no change in this respect.* This mistake was probably owing to the memorialists omitting to read the whole charter."

Now I might content myself with leaving the thing on your own statement. The words you quote from the charter of 1672, and in regard to which you say 'there is no change in this respect' have nothing corresponding to them, in any part of the charter of 1650. The word "governors" is not found in it. Nor is there any sentence corresponding with the one you quote; and of which you say it makes no change. But you have both misquoted and misinterpreted what the memorialists do really say. You put words between inverted commas as said by the memorialists, which they do not say, either exactly or in substance. The memorialists said, *that* it was ordered, by the old charter, that the corporation should consist of a President, five Fellows, and a Treasurer, and that the charter of 1672 wholly omits *this specification*, viz. that the corporation *should consist* of these persons. You represent the memorialists as saying "that the charter of 1672 omits the specification of five Fellows," &c. To put the matter in a clear light, and show how far you are borne out, in saying that the charter of 1672 made no change in respect to the specification in question, I will quote the beginning of both charters.

Charter of 1650.

Charter of 1672.

WHEREAS, by the good hand of God, there has been erected and continued a college in Cambridge, in the county of Middle-

WHEREAS, through the good hand of God, many well devoted persons have been and daily are moved and stirred up to give and bestow sundry gifts, legacies, lands, and revenues for the advancement of all good literature, arts, and sciences in Harvard College in Cambridge, in the county of Middlesex, and to the **MAINTENANCE** of the **President** and **FELLOWS** thereof, and for all accommodations of buildings and all other necessary provisions, that may conduce to the education of the English and Indian youth of this country in knowledge and godliness :

It is therefore ordered and enacted by this court and the authority thereof, that, for the furthering of so good a work, and for the purposes aforesaid, from henceforth that the said college in Cambridge, in Middlesex, in New England, shall be a corporation, consisting of seven persons, to wit, a **President**, five **Fellows**, and a **Treasurer** or **Bursar** ; and that **Henry Dunster** shall be the first **President**, **Samuel Mather**, **Samuel Danforth**, **Masters of Arts**, **Jonathan Mitchell**, **Comfort Star** and **Samuel Eaton**, **Bachelors of Arts**, shall be the five **Fellows**, and **Thomas Danforth** to be the present **Treasurer**, all of them being inhabitants of the Bay, and shall be the first seven persons, of which the said corporation shall consist, &c.

sex, called by the name of **Harvard College**, and that by an instrument or charter dated the 31st of May, 1650, the **President** and **Fellows** thereof were established to be one body corporate, by the authority of this court : And whereas several gifts and donations have been made and are still making, by many well devoted persons, inhabitants of this country, as also strangers, for the maintenance of the **GOVERNORS** and **GOVERNMENT** thereof, and for all the accommodations of the scholars thereof in books, buildings, lectures, scholarships, and all other necessary and fitting provisions, that may conduce to the education of the English and Indian youth ; now for the perpetuation and further advancement of so good a work and for the better encouragement of all persons therein concerned, or to be concerned, it is ordered and enacted by this court and the authority thereof, that **Leonard Hoar**, **Doctor in Physic**, be the present **President** of said **Harvard college**, **Mr Samuel Danforth**, **Fellow** of the said college, **Mr Urian Oakes** **Pastor** of the church of Cambridge, **Mr Thomas Shepherd**, teacher of the church of **Charlestown**, **Mr Joseph Brown** and **Mr John Richardson**, **Masters of Arts**, be the **Fellows**, and **Mr John Richards** the present **Treasurer** of the said college and corporation for the time being ; and that the **President**, **Fellows**, and **Treasurer** of the said college, or the **Fellows** alone, when there is

no President established, and their successors from time to time be the immediate governors thereof, &c.

The reader may now judge whether the new charter "made no change," in respect to the specification, that "the corporation should consist of a President, five Fellows, and a Treasurer," which the memorialists assert, and I must reassert to be wholly omitted in the charter of 1672. Nay, though the simple phrase "five Fellows," was not the specification intended by the memorialists, I will now go farther and say that that phrase does not occur in the charter of 1672.

In pursuance of this part of my attempt, I shall now adduce a series of Public Acts, which all confirm the interpretation here given of the charter, and which speak of the Fellows as persons supported at the college. With one exception, they are now, I believe, for the first time presented to the public, having been copied for the present occasion, from the manuscript records of the Court.

In August, 1652, a collection was directed to be made by the various towns, in the jurisdiction, for the service of the college. There is no doubt, from the document I shall immediately cite, that this collection was designed for the maintenance of the President and Fellows of college; but as that does not appear on the face of the act, I shall pass it over.

I.

Under date of October 19th, of the same year, (two years after the charter was granted,) the public records contain what is called "a Declaration for the advancement of learning," from which I extract the following passage. After stating, by way of

preamble, that the young men educated at Harvard college are apt, on their graduation, to seek employment in foreign parts, this Declaration proceeds.

“ It is therefore ordered and hereby enacted, by this court, that a voluntary collection be commended to the inhabitants of this jurisdiction, for the raising of such a sum, as may be employed *for the maintenance of the President, certain Fellows, and poor scholars*, in Harvard college, and for that purpose do further order that every town in this jurisdiction do choose one meet person, to take the voluntary subscriptions of such as shall underwrite any sum or sums of money for that purpose, and to make return thereof to the next court : and for as much as all the colonies are concerned therein, this court doth order the secretary to signify to the governors of the several colonies our endeavors herein, and to commend the same unto them, for their help and furtherance in so good a work.”

These collections throughout the State and the other colonies were actually made. Not only the towns in Massachusetts, but of Plymouth, New Hampshire, and Connecticut contributed their share “ *to the maintenance of the President and Fellows*” of Harvard college, under the charter of 1650.

II.

In June 1653, a noble donation was made by the court to the same end, and in the following words,

“ For the encouragement of Harvard College and the society thereof, and for *the more comfortable maintenance and provision of the President, Fellows and Students* thereof, *in time to come*, this court doth grant unto the said society and corporation, for the ends aforesaid, *two thousand acres of land*, within this jurisdiction, not formerly granted to any other, to be taken up in two or three places, where it may be found convenient, and to this end it is desired that the said corporation of the college will appoint some persons, in their

behalf, to find out the places where said land may be freely taken, and to make return as soon as they may, that the court may more particularly and expressly confirm the same."

In 1658 this liberal grant was laid out to the college, for the more comfortable maintenance and provision of the President, Fellows, and Students, in time to come.

III.

Again in August 1653, we have on the records of the court a document of some length, but of such particularity and interest, in this connexion, that I shall venture to quote the whole of it.

"The court being informed that the present condition of the college at Cambridge calls for supply, do order that Cambridge rate for this year, now to be collected, be paid in to the steward of the college, for the discharge of any debt due from the country to the said college; and if there be any overplus, to be and remain for the college stock and for further clearing and settling all matters, in the college, in reference to the *yearly maintenance of the President, Fellows*, and necessary officers thereof, and repairing the houses, that so yearly complaints may be prevented, and a certain way settled, for the due encouragement of all persons concerned in that work. The court doth hereby appoint Mr I. Nowell, Capt. Daniel Gookin, Capt. John Leverett, Capt. Edward Johnson,* and Mr Edward Jackson, or any three of them to be a committee to examine the state of the college, in all respects, as is hereafter expressed, Mr Nowell to give notice of the time and place of meeting :

1. To take account of all the incomes of the college and profits arising due to the officers thereof, either by gift, revenues, study rent, tuition fees, commencements, or any other profits, arising due from time to time, as near as may be since first the President undertook the work.

2. To examine what has been paid and disbursed either for buildings, repairing, or any otherwise paid or reserved annually for *maintenance of the President, Fellows, and other officers thereof*.

* Author of *Wonder working Providence*, see above, page 34.

3. To consider what may have been yearly received by the President, out of any of the incomes and profits aforesaid, for his own use and maintenance as near as conveniently may be, ever since he came to the place of President ; also what allowances have been made yearly to the *Fellows* and other officers.

4. To weigh and consider what may be fit for an honorable and comfortable allowance annually to the President heretofore, and for the future, and how it may be paid hereafter.

5. To consider what number of *Fellows* may be necessary for carrying on the work in the college, and what yearly allowance they shall have and how to be paid.

6. To direct some way how the necessary officers, as steward, butler, and cook may be provided for, that so the scholars' commons may not be so short, as they are now occasioned thereby.

7. To take cognizance of all and every matter and thing concerning the said college, in reference to the welfare thereof, in outward things and to present a way how to regulate and rectify any thing that is out of order.

8. To examine what sums have been and of late are promised, by several towns and persons, for the use of the college and to give order for the collection thereof, and propose a way how such monies may be improved for the best benefit of that society for the future, and this committee are hereby authorised to make return of what they do to the next court of election to be confirmed, if they shall judge meet."

From this important document many inferences might be drawn. It is superfluous to say, that it establishes, in the most ample manner, the residence of the *Fellows*, the point now under consideration. It proves, that the government claimed and exercised the visitatorial power : and whereas you have intimated, (p. 25) that the instructors of the college were alluded to, by that provision of the charter, which authorizes the President and *Fellows* to choose the necessary officers, you here see, by the sixth article of these instructions, that

the officers alluded to are steward, butler, and cook.

IV.

The committee thus raised made a report, which is not preserved, but the records of the court contain the doings had thereon, August, 1653.

"The court on perusal of the return of the committee appointed to consider the college business, do judge, that the ten pounds brought in upon account by the President of the college, for his care and pains for this twelve years last past, in looking after the affairs of the college in respect of building, repairing, or otherwise be respited, till this court take further order thereon; and that the contribution and subscriptions lately given in, or which shall hereafter be given in, by several towns and persons, together with all other stock appertaining to the college shall be committed to the care and trust of the overseers of the college, who have hereby power to give order to the Treasurer of the college to collect the several subscriptions, which are or shall be hereafter due from time to time; and in case of non-payment thereof, that it be secured by the several towns and persons, so long as it shall remain unpaid, and the produce of it to be paid to the said Treasurer, and *to be for the maintenance of the President, Fellows, and other necessary charges of the college*, and the several *yearly allowances of the President and Fellows*, to be proportioned as the said overseers shall determine concerning the same."

This document is of very great importance. It proves that the subscriptions so often alluded to made one fund with the other college stock, which fund was pledged, among other necessary charges,

to the maintenance of the President and Fellows. It proves that the distinction of two sorts of Fellows, those of "the House" and of "the Corporation" was not yet known; since had it been, the Fellows of the corporation, and not the overseers, would have fixed the stated salaries. Of the stock alluded to, the rents of Charlestown ferry were of course a part. Those rents were given as early as 1638, and considering the antiquity of the appropriation, its increased value, and its permanency, it is much the most valuable donation ever made the college. It is as solemnly pledged, as any act of those who gave it could pledge it, to "the maintenance of the President and Fellows of the college, and other necessary charges."

V.

To put this matter beyond question, I quote the following act of the year 1654. As it has been often printed* and the preamble, though interesting, contains nothing particularly to the point, I shall only quote the body of the act.

"It is therefore ordered by this Court and the authority thereof, that, besides the profit of the ferry formerly granted to the college, which shall be continued, there shall be yearly levied by addition to the country rate, *one hundred pounds* to be paid by the Treasurer of the country to the college Treasurer, *for the behoof and maintenance of the President and Fellows*, to be distributed between the President and Fellows according to the determination of the Overseers of the college, and this to continue during the pleasure of the country."

The document proves, if it needed proof, that the income of Charlestown ferry was appropriated to the maintenance of the President and Fellows.

* The General Laws and Liberties of the Massachusetts Colony, Cambridge, 1672, p. 30.

Charters and Laws of the Colony and Province, p. 80.

This act expressly says, that besides the profits of the ferry formerly granted to the college, there shall be yearly levied one hundred pounds for the behoof and maintenance of the President and Fellows. The mention of the gift of the ferry was not merely a historical mention of it as a fact; for then the original donation of 400*l.* which was laid out in erecting the buildings, would have been also commemorated, or alone commemorated, as the more important at that time. Instead of this, it is said, that besides the ferry formerly given, one hundred pounds more shall now be given, for the maintenance of the President and Fellows.—The proceeds of the ferry, without reckoning interest upon them, have probably amounted to as much as all the other unappropriated funds of the college at the present day, and in the plain interpretation of the acts and laws of those who gave them, they cannot legally be applied to any other object. But whatever be thought of this, which it was no part of my present object to urge, I apprehend that we shall not again be told, that the proposition relative to the residence of *Fellows*, in the intendment of the charter, rests upon “supposed analogies and gratuitous conjectures.”—The acts I have cited were passed by the men, who gave the charter, and knew what they intended to provide in it.

There is one remark relative to these donations, which irresistibly forces itself upon the mind. This annual grant of one hundred pounds to the President and Fellows—a munificent sum considered in reference to the poverty of the times—though annually expended in the support of these personages, is in reality to be considered a permanent stock or fund, of which the college, at the present day, is deriving the full benefit. It was given to support and uphold the college;

it did support and uphold it in times and circumstances, trying beyond the imagination of these prosperous days. It therefore lays the present generation as much under an obligation to administer the college according to the charter, as then understood, as if all those sums given, and all the interest on them, were now at interest and ready to lapse to the Commonwealth, if not appropriated agreeably to the conditions on which they were bestowed. It is observed in your pamphlet, that "a very large proportion of the college funds have been given to the college, under the present organization; and much larger sums since the non-resident fellows constituted the majority than before; and it is fair to presume, that the donors placed a confidence in the corporation as at present constituted," &c.—I have often heard statements like this, but never with full conviction of their justice. If money properly expended in the necessary service of the college be as truly invested in a perpetual fund, as if it had been put out at interest, there is no question but that the donations of the first thirty years are more important and valuable, than all the munificence of modern days. The contributions raised "in pecks, in half bushels, and bushels of corn," and turned in kind into the college buttery, look humble at the present day; but had it not been for them, not only the college would not have existed, but the State might never have attained and supported that character, which our fathers constantly ascribed in part to the happy influence of this seat of letters.

Having thus gone through a list of some public acts, I shall mention some private donations, expressly given for the support of resident Fellows, and which I must leave it to gentlemen "conversant

with judicial inquiries," to pronounce upon, in the present administration of the college charter, by which there are no Fellows to be supported.

I.

To the first of these I have already alluded. It is the "Fellows' orchard," afterwards called "Tutors' orchard" and "Tutors' lot," given in 1645, for the use of the resident Fellows; and though about twenty five years ago claimed by the non-resident corporation to be their property, yet still rented by the tutors on their own account, down to the present day. I would fain know why this alone of all the college property has been separated from the stock of the corporation, and retained in the hands of the residents?

II.

In 1652, two years after the charter, a merchant of Boston, named Coggan, gave a piece of real estate to Henry Dunster, President of Harvard College, "*for the use of the President and Fellows of the said college, so long as they and their successors profess and teach the good knowledge of God's holy word and works, and such languages, arts, and sciences as truly and christianly further the said good and profitable ends.*"—Here, I apprehend it to be exceedingly obvious, that the Fellows, for whom this foundation was made, were actually teachers. It cannot be said, that any of the present Fellows of the college teach any languages, arts, or sciences whatever.

III.

In 1653, John Glover of Boston, in his last will, bearing date April 11, gave a legacy to Harvard

College at Cambridge, "for and towards *the maintenance of a Fellow there, five pounds forever.*"

IV.

In 1653, also Robert Keyne left three hundred and twenty pounds, and about as much more contingently, "for poor and hopeful scholars, and *for some addition yearly to the poorer sort of Fellows.*"

V.

In 1670, the Pennoyer fund was given, by which it was ordered, that "*two Fellows* and two scholars *forever*, should be educated, brought up, and *maintained* in the college at Cambridge."

* * *

These foundations, some as I know, all as I presume, are still in existence and still productive. Terrific representations have been made, openly and privately, of the effect that the claim of the Memorial would have on the college funds, if it should be sustained. I should be glad to be informed what is the effect, on funds given for the maintenance of resident Fellows, of an administration of the charter, by which no such Fellows exist. Who receives that money given, on their death beds, by pious men, in times of small things, for the support and maintenance of the resident Fellows? How much or how little was given in this way, I do not know. The five foundations I have enumerated are all, of which I made a note in cursorily examining some of the college books, more than a year since, and with no view to this controversy. Very possibly much larger sums were given in the same way. I find in a document of Randolph, addressed to the privy council and bearing date October 12, 1676, after the new college char-

ter, the following account of the support of the Fellows, which would lead us to suppose, that very considerable permanent foundations were made for them, were it not that a part of their maintenance was derived from the annual State grant and from tuition fees. "The allowance of the President," says Randolph, "is one hundred pounds a year and a good house. There are but four fellowships; the two seniors have each thirty pounds per annum; the two juniors fifteen pounds, but no diet is allowed. These are tutors to all such as are admitted students.*"

I consider it, by this time, pretty well made out, that the Fellows, by the intendment and provisions of the charter, by many laws, and many foundations, were resident. It is obvious to enquire how the departure could be made at the first; and in what mode the consciences of those, who made it, were satisfied.—Though the paucity of documents does not enable us to point out the precise dates of the different stages of the progress, there can be but little division of opinion, as to the mode in which it was effected. I agree entirely with you, in thinking, that five Fellows were more than was wanted for the instruction of the small number of students, who resorted to the college in its early periods, especially as the President took part in the business of instruction. Though it is probable that *some* duty was required of *all* the Fellows, as a *quid pro quo* for the stipends they received, yet it is highly probable that three or four only had a considerable maintenance and one or two only a trifle toward their support. But in the process of time, as the country increased in population, and numerous establishments in the church were opened to the

* Hutchinson's Papers, 502.

graduates, the necessity of a provision for them at college became less urgent; and as the funds of the college at the same time were straightened, it was extremely natural that instead of five resident Fellows, non-residents should be introduced to fill the places not actually wanted for instructors. The habits of administering law were very loose, and unbounded liberties were taken with the college. Hutchinson says "the president of the colony and afterwards the governor assumed the whole authority, when they thought fit." The overseers, in their turn, were equally arbitrary, and even the president, Dr Hoar, expelled a Fellow for being of the church of England.* In 1672, a charter, with a majority of non-residents, was enacted. In 1673, according to Hutchinson, more members were added to the corporation. In 1692, a charter with eight Fellows was ordered; in 1697, another with a vice president and fourteen Fellows; nor was it till 1707, after an *interregnum* of *thirty five* years, that the charter of 1650 was professedly re-established. So long and in part so stormy a period for the college was sufficient to break up all steady administration, on the primitive construction.

The immediate *salvo*, made use of to cover the most important deviation from the charter, was the discrimination between Fellows of the house and Fellows of the corporation. When this discrimination was first made, it is out of my power to say. There is not the shadow of evidence, that it was coeval with the charter of 1650, and there are traces of its non-existence as late as 1707. Hutchinson, quoting the public records, says that Leverett was declared President January 14, 1707, and the

* Hutchinson's Papers, 502. This however rests on Randolph's authority and may be exaggerated.

college was put under his care, "agreeably to the choice of the *Fellows of the house*, approbation of the overseers, and votes of the council and assembly in their last preceding session."* Here *Fellows of the house*, in the official records of the government, are plainly put for the whole corporation. Moreover, in the controversy relative to Messrs Sever and Welsted, they are repeatedly called Fellows by the Overseers, without any such qualification as that of *Fellows of the house*. When this name was devised is of little consequence. It is sufficient that it is unknown to the charter, and that as has already been shown it entirely changes the legal constitution of the college.

One word more, with respect to the nature of this change and the consequent introduction into the college of a new board of non-residents, interposed between the overseers and the resident immediate government. You observe (p. 5) that as the president, a resident officer, is *ex officio* a member of the corporation, and as the memorialists contend that for nearly fifty years there was, besides the president, a majority of residents in the board, "how the non-resident fellows could have forced themselves into the board, against the will of the officers, and against the will of the overseers, who are visiters, it is not easy to perceive."—Though the difficulty is not great in my mind, I will endeavor to remove it. The first non-residents were introduced by acts of the government, altering the charter. When in 1707 the board was reduced from fifteen to five, it was made to consist of three non-residents and two residents. By what process this was effected I know not. By no process which you would call legal, for neither the general court, nor overseers have

* Hutchinson, i. 175.

the power to do such an act, (on the principles, which you maintain,) and there was no legal corporation.—When in subsequent times the board has been constituted of three residents, and two non-residents, the death or removal of one of the former would of course leave the residents and non-residents balanced ; and the president naturally inclines to the former, because the introduction of other residents into the corporation lessens his weight there. As to the overseers, their power is only negative, and could extend only to defeating the election of individual candidates.—They might indefinitely negative non-residents, as decidedly as they did Dr Sewall in 1720 ; but the corporation could indefinitely choose them.—Besides both they, the resident Fellows, the public, and the non-resident members of the corporation themselves appear to have been willing, that the affair should rest on the loose footing of a compromise. It is only till our own day, and since the year 1806, that the non-residents seem finally to have settled it, that no member of the immediate government, is fit to be introduced into the corporation. You say you read with wonder the statement of the memorialists, that “ this privilege (that of being of the corporation) was in 1806, after one hundred and seventy years possession, entirely wrested from them by the non-resident members of the corporation.”—The statement, however wonderful, is strictly true. Till 1806, with the exception of one short period at the end of the last century, some one at least, commonly two, often three residents had for one hundred years been Fellows. And it is only since 1806, that out of a body of instructors more numerous, and I hope not less respectable, than at any former period, the non-resident gentlemen have not found

a man worthy to sit by their side. Dr Ware was proposed, and strongly recommended, on your resignation, two years ago. His long connexion with the college, his devotedness to its interests, his thorough acquaintance with its concerns, his acknowledged energy and efficiency in administering its government, taken in connexion with the resolution adopted, when his professorship was founded, and adhered to for seventy years, that "*the professor of divinity should always be a member of the corporation,*" led to a very strong hope, on the part of many, that he would be admitted. But the non-resident gentlemen judged that the Hon. H. G. Otis was better acquainted with the college affairs, and more conversant with the administration of literary institutions, and he was accordingly elected.

It is now necessary to say something of the case of Sever and Welsted, "the tools with which an unholy and illiberal work was to be accomplished," as you call them, by rather a strong phrase, considering that the work in question is one, which you only "think you have discovered."—I would first premise, that you have taken no notice of the refusal of the overseers to confirm the election of Mr Sewall of Boston to the vacancy occasioned by Mr Stevens' death, and their requisition, that the vacancy be filled up by a resident Fellow. Since Mr Sewall's character was unexceptionable, and Mr Robie (the resident) had no particular recommendation beyond residence, you ought, I think, to propose some explanation of this step, on the part of the overseers.

But to return to the case of Sever and Welsted, which I think I shall show you have hastily treated. You first demur to the jurisdiction of the court, and argue that "the legislature had no authority in

the case," and intimate, that instead of quoting it as a precedent "the memorialists ought to blush for the legislature." Reserving the right of blushing, as one of those franchises which we are all free to exercise at our own discretion, let me observe that the legislature *acted by request* of the overseers. Yes, this "barefaced usurpation," as you call it, was actually undertaken by the general court, in consequence of a Memorial presented to them by the overseers, a body consisting of the governor, the eighteen councillors, and the ministers of the six neighboring towns, in which memorial, bearing date June 13, 1722, the *overseers* prayed the general court, that the number of the corporation might be enlarged, and that in so doing, regard be had to the "*resident Fellows or Tutors, that they be of that number.*"—And now, dear sir, what becomes of this "barefaced usurpation;" of your position, that the legislature had no authority in the case, that they attempted "to exercise powers truly despotic," that two discontented tutors "instead of applying for a *mandamus* or a *quo warranto* to settle the question of right, went directly to the legislature to ask them to judge upon private rights," and that in so doing they were but "the tools of an unholy and illiberal work," of which the authors and plotters, by a rather comprehensive denunciation, you assume to be "the Mathers and the rulers of the church and State generally?" It is, you perceive, entirely imaginary. The motion was given *by the overseers*, who asked an enlargement of the numbers of the Corporation, in order that the resident Fellows might be brought in.

This memorial of the overseers was committed to a joint committee of both houses, which consisted of the following persons,—for it is important to

name the individuals, that stood forward, in dealing out "the fury of the popular branch" on this occasion.—The committee consisted of *ten*, five from the house and five from the council. The members from the house were John Clark, very often a representative from Boston, and whose character may in some degree be inferred from his place as speaker of the house; Elisha Cook also a Boston member, clerk of the Supreme Court, and at a subsequent period agent of the colony at London and a councillor. He was a very decided member of the popular party, but receives from Hutchinson, whose testimony on such a point is certainly impartial, the character of "a fair, honest man, open in his conduct and actuated by love of his country." John Wainwright, of Ipswich, another of the committee was often employed in high trusts. John Stoddard, of Northampton, was a fourth. "Few men," says Hutchinson, were more universally esteemed; and his father, famous Solomon Stoddard, whose memory is still as a pot of frankincense in Northampton, who was graduated twelve years after the charter of 1650 was given, and who had been a Fellow under it, was still living and able to inform his son, what the provisions of the charter, in those primitive times, were understood to be. Lastly, of the committee of the house was, John Quincy, an honorable name of an honorable man, whom I shall not waste words in vindicating from the general charges, which you make against the promoters of this measure. Now let us look at the committee of the council. They were, first, Thomas Hutchinson, father of the governor, a distinguished Boston merchant; for twenty five years consecutively a member of his majesty's council; a man allowed to merit the pious testimony of his son, "that

regardless of the frowns of a governor or the threats of the people, he spoke and voted according to his judgment, attaching himself to no party, any further than he found their measures tend to the public interest." Next was Edmund Quincy, a man in whose praise the pages of our history are eloquent. From youth till death, he was an object of love, confidence, and pride ; an active and skilful soldier ; an eloquent speaker, an upright and honorable judge ; one of the most useful and accomplished gentlemen in the province, who died as he had lived, in the service of his country, and was honorably buried at London, at the public expense of his native land. Another of this committee was Addington Davenport ; of his history and character I know nothing, but that he was Chief Justice of the Supreme Judicial Court. Another was Benjamin Lynde, also Chief Justice of the Supreme Judicial Court. He was chairman of the committee ; of which, finally, the last member was Paul Dudley, then the first name in the province, son of the veteran governor, Chief Justice of the Supreme Court, Fellow of the Royal Society of London. Let me have the pleasure of transcribing his character, in the glowing words of his successor, Chief Justice Sewall.

" Here (on the bench) he displayed his admirable talents, his quick apprehension, his uncommon strength of memory and extensive knowledge ; and at the same time his great abhorrence of vice, together with that impartial justice, which neither respected the rich, nor countenanced the poor man in his cause. Thus, while with pure hands and an upright heart he administered justice, in his circuit through the province, he gained the general esteem and veneration of the people. As his presence always commanded respect, so it might justly be said of him, that he scattered iniquity with his eyes, which struck with awe the most daring offenders.

When he spoke, it was with such authority and peculiar energy of expression, as never failed to command attention and deeply to impress the minds of all, who heard him ; and his sentiments of law and evidence, in all cases before the court, had generally a determining weight with those, who were charged with the trial of them."

Such is the splendid character of Chief Justice Dudley, given by one authorized to do it ; and such, as we have seen, the committee to whom the question relative to the college was entrusted, and whose report we shall presently quote. A committee composed of what was wisest, most learned, most patriotic in Massachusetts, containing, without exaggeration, some of the most venerated names of that period of our history ;—three individuals, who filled successively the office of Chief Justice of the supreme court, a fourth a side Justice of the same court ; and the others, as far as we know them, men of the most respectable standing. These were the leaders of what you call an unholy and illiberal work ; these the men who committed a barefaced usurpation, who assumed an authority to which they had no title ; who transgressed the dictates of British law and well regulated liberty.

There are one or two facts relative to Chief Justice Dudley, which deserve particularly to be taken along with us, in estimating the merits of this transaction.—He had himself been a Fellow and Tutor of the college ; and he is the first individual on the catalogue, to whose name the title *Tutor* is given. He took his first degree in 1690, and allowing him to have been made tutor the same year, a space of forty years from the charter of 1650 had elapsed, in all which, not an individual is entered in the college catalogue as a tutor ; and the only college titles to be found are President, Fellow, and Treasurer. As there were no Professors, till about

1721, this fact alone proves one thing, viz. that there were no instructors at college, who were not Fellows ; and that there must, down to a period as late as 1690, have always been as many resident Fellows as were needed for the business of instruction.

But there is another remark relative to Chief Justice Dudley's connexion with the college. He was born twenty three years after the charter of 1650, and of course was near enough the period of it, to receive from his father and the older members of the community direct information of the nature and provisions of the charter in its original intendment. Being himself the first individual with whom a discrimination between the offices of Fellow and Tutor was attempted, his attention must have been specially turned to that point. Having studied law at the Temple, and being a lawyer acknowledged without a superior, and at the moment when the report was brought in, a Judge on the bench of the Supreme Court, he knew both the legal interpretation of the charter and the powers of the Legislature relative to the college.

It may be thrown out, that we know not that the report was unanimously made by the committee. True we do not know this. But as the committee consisted of ten, the report must have been adopted by at least six, on the most unfavorable supposition. There is, in no part of the account, a hint of a division ; and no trace is to be found of any opposition to it, in its progress through the House, or Council.

Such then was the constitution of the committee appointed on this occasion, and the following the report presented by Chief Justice Lynde :—

“ The committee appointed to consider the memorial of the Overseers of Harvard College in

Cambridge, having perused and considered the Charter granted to the said College, by the General Court of the Colony of Massachusetts Bay in the year 1650, (which is their present constitution,) and also the memorial aforesaid, came to the following resolutions, which being put in practice would answer the end of the memorial and be more beneficial to that Society, than enlarging the number of the Corporation.

"1. That it was *the intent of the said College Charter*, that the *Tutors of the said College*, OR SUCH AS HAVE THE INSTRUCTION AND GOVERNMENT OF THE STUDENTS, *should be the Fellows and members of the Corporation of the said College*, provided they exceed not five in number.

"2. That none of the said Fellows be Overseers.

"3. That the said President and Fellows of the said College, or the major part of them, are not warranted by the said Charter of the College to fix or establish any salary or allowance for their services, without the consent of the Overseers."

Now, considering that the Legislature was requested by the Overseers, in a formal memorial, to enlarge the numbers of the corporation "regard being had to the resident Fellows or Tutors, that they be of that number;" it seems rather hard to denounce it as a barefaced usurpation, that they reported their opinion of the meaning of the charter and ordered that to be enforced. This order they had as good a right to pass, as the one which they were requested to pass by the Overseers; and even you will allow, that had the Overseers and Corporation accepted this order or act, it would have been legal. There was then no usurpation in passing the Act; the only usurpation (on your own principles) would have been in violently carrying in-

to execution an act passed and not accepted by the Corporation and Overseers. It is certainly free to the Legislature to *offer* a new charter or a modified charter to any institution.

But if my recollection serves me, the Corporation did not, as you do now, demur to the authority of the Court. I may err, for I speak from a recollection of more than a year, which I have not the means of refreshing, and I shall cheerfully confess the error if it be one. But I think the Corporation did not call in question the legality of the Order; that they argued to the *intent and meaning* of the Charter and the *expediency* of the change proposed. I do not recollect that they disclaimed the right of the Court to pass the order.—

My own opinion is, that by the power reserved to the State by the law of 1642, and also as visiters, they had a right to enact the order. But this opinion I suggest with distrust, as I am aware that it is a *questio vexata*, who are the visiters of Harvard College. Mr Webster thinks the Corporation are visiters. You think the Overseers are visiters. The General Court of the Commonwealth in 1812, supported as I have heard by the late Hon. Mr Dexter, claimed and exercised the visitatorial power, not only without the assent, but against the remonstrance of the Corporation.—It seems therefore without warrant, that you call the exercise of this power by the Legislature of 1722, a barefaced usurpation.

To proceed, however, with the narrative; the House of Assembly accepted their committee's report, namely, "That the tutors of the college, or such as have the instruction and government of the students, should be the Fellows and members of the corporation, provided they exceed not five in

number," such, according to the report, being "the intent of the charter:" and it was therefore ordered that "the corporation for the future practise accordingly." The council concurred in this order; and the governor signed the order, with the proviso, that "the Rev. B. Colman, Rev. B. Wadsworth, and Rev. N. Appleton are not removed by said order, but still remain fellows of the corporation." It was on the view of these facts, that the memorialists observed that "the order in question passed in perfect legal form, notwithstanding governor Shute's proviso; an anomalous nullity of no account." At this, you exclaim; you call it "strange." But you do not answer the question fairly put in the memorial, and on which the whole matter turns. The assembly passed the bill, the council concurred, the governor signed it, with a proviso.—Now it is asked in the memorial; "If he could subjoin a proviso one moment after signing, why not an hour, a day, or a year?" I presume that with respect to giving his assent to bills, the governor then, as now, could do only one of two things, *give his assent* or *not give it*. I never heard of a power to give it with a proviso; and I still think such a proviso "an anomalous nullity." But why should we stand on words? Did the governor object to the *principle* of the order? No.—The order was, that henceforth the resident tutors or instructors be the Fellows of the corporation, in which there was at that time one vacancy. The governor signs this order, only stipulating that the present non-residents should not be turned out.—Is there not here ground enough for saying that all branches concurred? The facts are before the reader, and I will submit to his judgment.

But the House of Assembly justly conceiving that the governor's proviso, if carried into effect, would defeat the main design and purpose of their votes, requested him to withdraw it. You infer from this, that the main design was a vindictive one, "instantly to get rid of certain obnoxious men;" and you endeavour to show that Dr Colman was obnoxious. He was so, and though a very great and good man, he was naturally obnoxious; for he was introduced into the ministry, against the order of the churches then established. That this should render a man obnoxious, one hundred years ago in Massachusetts, does not imply a "furious" character or a thirst for "summary vengeance" on the part of the people or their leaders. Moreover, you speak of "obnoxious *men*;" but I never before heard that Mr Wadsworth or Dr Appleton, the other two individuals in question, were obnoxious. There is no necessity then for thus vilifying the House of Assembly. The overseers had asked them for an order, of which the only alleged design was to introduce the residents into the corporation. The house passed an order, of which this was the main design. The governor assented to it, with a proviso, which would have admitted one only of the residents at present, and would have excluded two more, who had the same right, for an indeterminate period. The assembly therefore said the governor's proviso defeated their main design. The house requested the governor to withdraw his proviso, which he declined doing, as he had made it by advice of the council and of the overseers. On this the house voted, that the council in giving this advice had contradicted their vote of concurrence in the order. This was certainly true, and being so, it cannot be called a burst of popular fury to assert it, in a sim-

ple moderate way, and it will not be said, that the house did more than this.

Notwithstanding the impatience of "a restraint on their summary vengeance," which you ascribe to the house, they did nothing further this session. The next session, they only passed a resolution counselling the corporation to adhere to their charter. When the corporation requested to be heard, in opposition to the *principle* of a measure, which had passed the house, passed the council, and received the governor's assent, with a saving only of the individual seats of the non-resident incumbents, the house, I will not say properly, but very naturally, refused to hear them. The corporation wished to argue against a *principle*, which every branch of the government, with the assent of the overseers, had already enacted.

The next year, in the winter session, the subject was resumed; the three resolutions re-enacted, and sent up to the council, who deferred the matter till May, and nothing was done by "the fury of the popular branch" to hasten them.—In May, 1723, poor Sever and Welsted, (the discontented tutors,* whom you represent as having gone directly to the Legislature *a year before*, and having been the tools, by whom this "unholy work" was put in motion,) presented a memorial praying that they might have the benefit of a *principle*, in which every branch of the government had, a year before, concurred. On receiving the petition, the House sent to the council to know, what they had done with the resolutions re-enacted the previous session. The council informing them they had done

* Five years after, Mr Welsted became pastor of a church in Boston, and is called by Father Barnard of Marblehead, (in his letter to President Styles,) "A man of learning, a pious, humble, prudent and useful man in his day."

nothing, the house brooked this restraint on their summary vengeance, so far as to put off the matter till another session, for three were then annually held. The first day of the next session, the house took up the affair; as the council did also. The council requested the house to give the corporation a joint hearing against *a principle*, which all branches of the legislature had sanctioned; and the house refused, *unanimously* refused. The corporation were then heard before the council, who non-concurred the resolutions, and here the affair stopped. It stopped, in its outward management, but not in its effects on the corporation. They had from two legislatures received a useful lesson. The house that enacted the orders in 1723 and on whom you bestow such bitter reproaches, but who nevertheless contained among them some of the noblest and purest sons of New England, were dissolved and returned to the bosom of the people. A new house was chosen and confirmed the doings of their predecessors, and, finally, by an *unanimous* vote. —What! was every individual of that house concerned in a barefaced usurpation, led away “by popular fury,” kept up for five or six sessions? Is this a probable account to give of the fathers of Massachusetts? This the character of the Quincys, the Dudleys, and their colleagues?—I do not believe it. Moreover there is very strong reason, to think that the corporation finally procured the non-concurrence of the council by engaging to *compromise* the matter; for Professor Wigglesworth was chosen to the existing vacancy, and tutor Sever to the next, at a time when tutor Flynt was already in the board.

Such is this affair and such the grounds on which you accuse the Legislature of “haste, passion and

unfairness," of "acting against the fixed principles of British law and regulated liberty," of being "utterly unworthy of notice," a "disgrace to the State," of setting an example which, instead of quoting, the memorialists ought to blush for, of being a body concerned in "an unholy and illiberal work," and more in the same strain.

I now come down to the period when our State constitution was formed, and the privileges of the college confirmed by it. You draw an argument from this, which from the summary and emphatic manner in which you pronounce it, you appear to think of itself decisive. Your argument is as follows.

"As all the charters had fallen by the revolution, or might, (if the people had so pleased,) be considered as fallen, they were at liberty to remodel all the corporations of the State. At least there could then have been no power to control them. Towards Harvard college their attention was *specially* directed, and they made its concerns the subject of a *special chapter*.—The corporation was then *full*; full of non-residents except one. It is admitted by *all* that the office is a franchise; in this case, a freehold to the members. They were *personally* confirmed in *their franchise*. This was the most *solemn construction* and decision, by an authority before which all legislatures and courts, which derive authority under it, must bow." page 31.

As, in various parts of your pamphlet there is a semblance of laying down legal principles, in opposition to crude and merely popular notions on the part of the memorialists, I must here observe that your suggestion relative to the effect of the revolution on charters is wholly groundless, both in reason and in law. Strange indeed, it would be, if a revolution of a sober and virtuous people, and having for its main objects the security of right and property, had begun by annulling all the obligations

of the social compact with respect to both. But, however, to establish the point, Chief Justice Marshall says, "It is too clear to require the support of argument, that all contracts and rights respecting property remained unchanged by the revolution. The obligations, which were created by the charter to Dartmouth college, were the same in the new that they had been in the old government.* Mr Justice Story in the same case says, "It is a principle of the common law, which has been recognized in this as well as in other courts, that the division of an empire works no forfeiture of previously vested rights of property. And this maxim is equally consonant with the common sense of mankind, and the maxims of eternal justice."†

But I am willing, *for the sake of argument*, to concede, that the college charter was, or might have been vacated by the revolution, and that it rested with the people, in framing the constitution, to confirm it in whole or in part, or not, as they pleased. The only question then is, *what* did the constitution, or the people in framing it, confirm and establish with respect to *the President and Fellows* of Harvard college? You say that the incumbents at that time were *personally* confirmed, in their *franchise*, as members of the corporation. The whole argument, of course, rests upon the word *personally*, and you have very naturally distinguished it in the print.—The members of the corporation, at that time, were, I think, Mr Bowdoin, Dr Cooper, Dr Howard, Dr Lathrop, (of Boston,) and Professor Wigglesworth of Cambridge. You argue that these gentlemen (four of whom were non-residents) were confirmed *personally* in their franchise as members

* Dartmouth College Case, p. 326.

† Ib. p. 373.

of the corporation, by the constitution.—On turning then to the *fifth chapter* of the constitution, which is wholly occupied with the college, we may verify the soundness of the argument. The only passage, which relates to this point, is the following.

“The President and Fellows of Harvard college, in their corporate capacity, and their successors in that capacity, their officers and servants, shall have, hold, use, exercise, and enjoy all the powers, authorities, rights, liberties, privileges, immunities and franchises, which they now have, or are entitled to have, hold, use, exercise, and enjoy, and the same are hereby ratified and confirmed unto them, the said President and Fellows of Harvard college and to their successors, and to their officers and servants respectively forever.”

This is the provision, on which your argument rests, and it is not to be wondered at, that you do not quote it, for it does not bear you out, in precisely the point to be proved. No one doubts that the constitution confirmed the privileges of the corporation of the college. The question is, did it confirm the privileges of those, who were or should be *rightfully* the Fellows; or did it confirm the then incumbents, rightfully or wrongfully, in their offices, or, in your own language, did it confirm them *personally*. Certainly it did not the latter. No allusion is made to them personally; it is not said that “Hon. James Bowdoin, Rev. Dr Cooper, Rev. Dr Howard, Rev. Dr Lathrop, and Rev. Professor Wigglesworth, the present Fellows of Harvard college, in their corporate capacity, &c.” They are not named. They are not personally alluded to. All questions of fact are wisely left untouched. Who were the rightful Fellows, it was no part of the business of the framers of the constitution to settle.

A moment's reflection on the intention of the constitution is enough to refute the present argument. Who can suppose that the framers of it, in proposing this chapter to the people, meant to ask them to pass sentence on the respective titles of the individuals personally to their offices? The business of the framers of the constitution was to secure the college, not to secure Mr Bowdoin nor Dr Wigglesworth. They either intended to confirm those who were *rightfully* members of the corporation, or those who were *wrongfully*. It would be derogatory to their probity to say, they meant to confirm those who were wrongfully members, and if they meant to confirm only those, who were rightfully members, then the question at any time recurs, who were rightfully members of the corporation.— Suppose (for argument's sake) that one of the corporation of 1780, like one of the corporation of 1740, had been notorious for intemperance; would this provision of the constitution have saved him, and continued him in office? Suppose the corporation had claimed at this time to possess a tract of land, but by a bad title; would this provision of the constitution bar the *legal* claimant? Certainly not. The constitution meant to heal no defective titles, to cover no violations of chartered rights, intentional or unintentional. It cannot seriously be thought, that in the very act of confirming a charter, it intended to shut the door to all remedy against a capital violation of it. There seems to me absurdity in the terms of the proposition.

There is one topic, which I had intended to treat in some detail, but from which the length to which I have already been led, obliges me almost entirely to abstain; I mean the visitatorial power. No part of your pamphlet has appeared to me more

hasty than that, where you deny the competency of any body, short of a court of justice, to grant relief, supposing the grievance alleged in the Memorial to be sustained. On any mere point of law, I should place no reliance on my own opinion, in opposition to the views of a jurist distinguished like yourself. But you repeatedly recognize the visitatorial power; you suppose it to reside in the board of Overseers; and nothing is better settled than that the law very much favors the jurisdiction of visitors in colleges, and discourages a resort to courts. The English courts have refused to take cognizance of cases attempted to be brought before them, on the ground that it was for the interest of the colleges, that controversies arising in them should not be brought before the public. Mr Christian, in his notes to Blackstone, thus expresses himself.

"It is the duty of the visitor, in every instance, to effectuate the intention of the founder, as far as he can collect it from the statutes and the nature of the institution; and in the exercise of this jurisdiction he is free from all control. Lord Mansfield has declared, that 'the visitatorial power if properly exercised without expense or delay, is useful and convenient to colleges,'—and it is now settled and established, that the jurisdiction of a visitor is summary, and without appeal from it. 1 Burr. 200.*"

Mr Justice Story, in his learned opinion in the Dartmouth college case, is equally full to the same effect. He observes,

"To all eleemosynary corporations a visitatorial power attaches as a necessary incident; for these corporations, being composed of individuals subject to human infirmities, are liable, as well as private persons, to deviate from the end of their institution. The law therefore has provided, that there shall somewhere exist a power to visit, enquire into, and cor-

* Christian's Blackstone, I. 484.

rect all irregularities and abuses in such corporations, and to compel the original purposes of the charity to be faithfully fulfilled."*

A good proportion of the cases, in which the visitatorial power has been exercised in the English colleges, concern the claim to Fellowships, on which claims the visiters have never scrupled to decide. Nay, even in our own college, in the only instance of which any detailed account remains of the removal of a Fellow, the Overseers exercised the visitatorial power of removing him, without the aid, and against the protest of the corporation. The appendix to the Memorial of the corporation, published in 1812, pronounces this "a singular procedure on the part of the Overseers."—Nothing, however, could be more regular, nor better supported by the whole law of visitation; supposing the Overseers to be the visiters.—But the truth is, the constitution of Harvard college does not rest merely on the common law of visitation. The charter of 1642 reserves to the State an unlimited control over the affairs of the college. If the Overseers then are visiters, they have sovereign power to administer a remedy to any evil not fatal to the charter. If they are not visiters, the State is doubly competent, 1st, as visitor; 2d, by power reserved; and if the infraction of the charter is of such a nature as to operate a forfeiture, the State alone, in its capacity of sovereign, can afford a remedy, by regranting the franchises. This, no doubt, the State is fully competent to do. Four new charters have been granted to the college, since the original appointment of the overseers as perpetual feoffees in 1642, and

* Dartmouth College Case, p. 346.

when, on the revolution, that board expired by the change in the form of government, their successors, by an act of sovereign authority, were designated in the constitution. In 1722, the *overseers* requested the legislature to enlarge the number of the corporation, by adding the resident Fellows or tutors to it. And though there may be doubts whether the visitatorial power in itself extends to the appointment of Fellows;* there is no doubt that in virtue of the powers reserved to the State, and often exercised by it, a full remedy exists to fill up the whole corporation, should all its seats at once be vacated. Our fathers had no idea of putting this power out of their hands. The legislature was, from the first, nursing father and mother to the college. The college came to it for every thing; for annual supplies; for frequent extraordinary grants; for new charters; for remedies under the old; sometimes even for bye-laws. Of the latter, the early records of the court contain the following curious example, which may be added to those already quoted to prove the residence of the Fellows.

"1656, Oct. 14. It is hereby ordered, that the President and Fellows of Harvard College, for the time being, or the major part of them, are hereby empowered, according to their best discretion, to punish all misdemeanors of the youth in their society, either by fine or whipping in the hall openly, as the nature of the offence shall require, not exceeding ten shillings, or ten stripes for one offence; and this law to continue in force until this court or the overseers of the college provide some other orders to punish such offences."

If then the memorialists, as you intimate, are very careful not to specify the remedy, which they

* It is laid down by Kyd, ii. 270, that the visiter, as such, has not this power.

Society = body of Socii or Fellows - R

expect, it was not from any doubts of the full power vested in the proper quarter to afford it. The memorial, you will remember, was addressed to the corporation, and it was in the trust and hope that the subject would there be amicably arranged. That a different course has been adopted is well known not to be the fault of the memorialists.

I have now gone through, I believe, the whole argument of right, and it would be next in order to follow you into that of expediency. This I would very cheerfully do. The topic is one, which it would be in my power to treat, much more fully than that of law or of right. It is one, moreover, in which all the advantage in the discussion would be on my side ; for while you, in setting forth the evils of a resident corporation, have nothing but conjecture, or if you please, probability to go upon, at least for the last century, I might, in arguing in favor of a resident corporation, review the whole history and administration of college for years past ; and it would of course require but little skill to gain the victory, in such a contest of fact with conjecture.

But I forbear to enter into the discussion. I have protracted this letter beyond the limits, to which most readers will accompany me. The subject of expedience is a wide field, of itself enough for separate discussion, and I must add that your remarks, on this head, are of such a nature, that I could not trust myself to engage in a full reply. I shall only, in an exceedingly cursory manner, advert to a few of your statements.

You first endeavor to burden the doctrine of the memorialists with the odium of the abuses in the charitable establishments in England. You observe

"We had supposed every reading man in Great Britain and in America had been satisfied, from the investigation in Parliament, as to the charities for education, that there had never been laid open before such a scene of corruption and abuse, and that this had arisen, precisely because these corporations had been in the hands of the incumbents, under the visitation sometimes of those *self-chosen* masters and Fellows of colleges, and sometimes of right reverend bishops, but whose visitation had become perfectly nominal."

I must confess the reading men of Great Britain and America have enjoyed sources of information, beyond my reach, if they have ever read of colleges "under the visitation of self-chosen masters and Fellows."—Moreover if I mistake not, the colleges in the two universities of Oxford and Cambridge, of Eton, Winchester, and Westminster, and several others, were excepted from the jurisdiction of the parliamentary committee, to which you refer.

You next argue, that though the residents may be (as the memorial alleges) *practically* acquainted with the business of education, this circumstance does not fit them for administering the college. On the contrary, it prevents them "from being *practical men*, in a more extended sense: precisely in proportion as they shall devote their *lives* to the business of education, they must have had fewer opportunities of knowing the world, its wants and expectations; its opinions and feelings; its business and concerns."—This, I confess, passes my comprehension. To say that men, whose profession it is to conduct the immediate instruction and government of the college, who receive annual deputations, (as they may be called) of the rising generation from all parts of the country, with the wants, wishes, and opinions of parents and guardians, expressed with the most anxious detail; who by

every mail almost receive letters, in which some opinion or fact relative to every branch of education or discipline, as considered by the community, is illustrated ; who read the newspapers, go into society, and enjoy precisely the means of general information, which the most non-resident member of the corporation can enjoy ; to say that such men do not know the wants of the community, *as to education*, is in my mind mere paradox. It is too much to argue that the insurance offices must be frequented, the courts of law followed, or the duties of a pulpit discharged, in order to give a man such a knowledge of the world, as would enable him to administer a college. Let us reverse the proposition. Let the memorialists adopt your language and say to the directors of the Suffolk bank or the marine insurance office ; “ gentlemen, you may understand banking and insurance, but that is not being practical men in a more extended sense. You ought to move away from Boston, come and fix yourselves at Cambridge ; plunge deeply into books ; study the human heart ; learn the wants and expectations, the opinions and feelings of the world, from the volumes of those, who have speculated most deeply upon it, and then you will be qualified to send down your orders to the clerks, and the business will go on well.”

You next argue against the convenience and expediency of vesting the power of election, of fixing salaries, and assigning duties to the actual incumbents. But, in the first place, no measure, in reference to either, can pass without the approbation of the overseers ; a check, to which you have not thought proper, I believe, so much as once to allude. You not only charge the memorialists with seeking “ the *exclusive* government” of the college ;

but in detailing the fancied evils of having the corporation composed of residents, you speak, as if their acts were final. It is as if a politician, arguing against entrusting certain powers to congress, should insist on considering the house of representatives as a sole independent body, and wholly shut his eyes on the negative of the senate. Moreover, the evil, in one respect, according to you, already exists, on the present system. You say that, as to the elections of tutors and the assignment of all the duties of instruction and government, the residents, even at present, have this power ;—that the corporation at present generally conform to their recommendations.—In this there is too much truth. The corporation, themselves of necessity ignorant of the details of college, several of them, from never having been instructors, being in want of that *tact*, which nothing but experience ever gave or ever will give, are obliged to come to the immediate government, to know what laws they shall pass, on many very important subjects. As the president is the only member of the immediate government in the corporation, the effect of this state of things is to put almost the whole control of the college into his hands, and instead of having the college administered by six residents, it is administered by one.—When you say that the president always has represented the opinions and views of the immediate government to the corporation ; you advance, (to say the least) what you could not by any possibility know.

You ask also whether the non-resident professors “will be more contented, more disposed to submit to the government of their own associates, in the election of whom they have no voice, than they now are to a body of disinterested indepen-

dent men, who cannot *even be suspected of personal views?*" This is what is called making the most of a thing. The non-resident professors are, with two exceptions, medical or law professors, who scarce come in contact with college ; and as far as their own interest is concerned, I do conscientiously believe, that Dr Warren, and Dr Gorham, and Chief Justice Parker, would as lief submit the college to the government of a resident as of a non-resident corporation. I say, as far as their own interest as professors is concerned. You speak of the non-resident corporation as a body of "disinterested, independent men, who cannot even be suspected of personal views."—Why not? Whence this sovereign virtue of non-residence? What is there to secure gentlemen living in Boston, from the reach of the same suspicions, as would affect other men, in the administration of a patronage of twenty or thirty thousand dollars a year? You reply, perhaps, they are not themselves candidates.—For the highest and most lucrative office in their gift, they are ; and the history of the college, for the greater part of the last century, shows that they are not only candidates, but have been the *successful* candidates. In 1724, *two* members of the corporation were successively chosen presidents, "though the voice of the people, says Dr Eliot, cried aloud in favor of another candidate ;" and, in 1773, *three* members of the corporation were successively chosen to the president's chair, in like defiance, (according to the same candid historian,) of the public sense of decorum. From the practice, which has long prevailed, of having two clergymen in the corporation, it is obvious that the most prominent candidates for the president's office will be in that body, as long as this practice is kept up.

I see no plausible ground, therefore, on which you speak of a non-resident corporation as necessarily a body of disinterested, independent men, who cannot even be suspected of personal views. Even as to the other offices, for which the members of a non-resident corporation are not likely themselves to be candidates, they are not, on this account, beyond the possible reach of interested motives. They are men: they have human hearts, human weaknesses; they have relatives and friends.—You have the kindness, after setting forth the scene of corruption, which would ensue from making the corporation consist of a sworn Professor of Divinity, of moral philosophy, of mathematics, &c.—the hungry scramble for preferable offices, the unrighteous diversion of the college funds into extravagant additions to their own salaries, the cabals and intrigues;—to say that you acknowledge these things would not happen, under the administration of the present instructors, but only under that of the instructors, who might hereafter succeed them. For one, I cannot find it in my heart to be grateful for a saving clause like this; nor will I, (though I well might,) imitate you in its application. I will rather say, that I heartily allow the present non-resident gentlemen of the corporation to be men of disinterested independent character, and I have no doubt they will transmit their places, in any event, to men honorable like themselves. But I cannot admit that their honor is by any necessity to be more unsuspected than that of any other men, in stations equally high and confidential. I cannot admit that the security against corruption is to be sought merely in the impossibility of committing it; that conscience, and sense of character, and the obligation of an oath are to pass for nothing; and that the

resident instructors, if they were clothed with the powers of the corporation, would be immediately open to the suspicion of abusing them all, for their own base emolument. I believe it would be just as reasonable to say, that if a resident officer were the Treasurer, he would run off with the college funds.—Nothing is to prevent him, but sense of character and the power of principle; and why should it not be assumed as a maxim, that men of the standing, which is requisite to the offices and government here, will always be under that same moral influence? Or if you will not allow that; if you maintain that, in the natural operation of things, the members of a resident corporation would engage in a profligate scramble for better places and higher salaries; then I would fain know what exempts the members of a non-resident corporation from the same suspicion of grasping themselves at the office within their reach, and with regard to those which are not, securing them for brothers, sons, cousins, and nephews?

You have said much of the little probability that a resident corporation would enjoy that public “confidence, which is necessary to the success of such an institution as Harvard university.” You mention the superior advantage of men, who possess “a wider and more commanding influence in the government,” than the instructors here can be supposed to possess. And you maintain that to adopt the views of the memorialists would be “to surrender all the college concerns to persons, whose interests can never be precisely the same as those of the public, and may sometimes be directly opposed to them.” Permit me to say, that I have dwelt upon these and several similar intimations in your pamphlet, with much regret, and with no little

embarrassment as to the sort of answer, which ought to be made. It is certainly no secret, that the present mode, in which the corporation is composed, viz. that of having three of its five Fellows selected from the leading civil characters, has had the effect of committing the college on the score of party politics, rendering it an object of suspicion and odium to a majority of the community, and drawing down upon it repeated and heavy acts of public dislike. I am willing to allow the most that can be claimed, that all this has been an unavoidable consequence of the deplorable state of political excitement. It may not have been possible for the members of the opposite parties, to meet on the benches of the corporation with that harmony, which is necessary to transact business. The revolution effected by the corporation of 1810 in the board of Overseers, the oldest literary body in the country, which had existed one hundred and sixty eight years, may have been equally necessary, to prevent a clashing between the corporation and the Overseers. But if these are the *necessary* consequences of having a non-resident corporation; if these are the unavoidable effects of putting the college into the hands of gentlemen, who, by their station in society, have led the ranks in the political warfare, what stronger argument of expediency can exist, for a different organization; an organization, which should bring into the corporation, a class of men, necessarily in a good degree removed from political controversy, and whose administration could not have the effect of identifying the college with any party?

But it is more than time that this letter should be brought to a close. I can of course be no competent judge of the opinion, which the public will

form of the merits of the controversy ; but I have no fears that the final decision will not be that, which truth and reason shall dictate. I join with you in indulging the hope that "the tendency of the discussion will be to make the affairs of the college better known to the public." I believe it is possible for the institution to become again the favorite, as it is the first born child of the commonwealth. By care bestowed in lessening the expense of an education within its walls, in adapting the system to the practical spirit of our country and age, and in bringing back the college to the paternal roof of the commonwealth, I believe it can be made to take deep root in the hearts of the people. In no other soil will it ever flourish.

Asking your candid indulgence for any error, into which I may have fallen in the hasty preparation of this letter, especially for any undue warmth, into which the discussion may have betrayed me, I remain, with high respect,

Your faithful, humble servant,

EDWARD EVERETT.

Cambridge, Sept. 25, 1824.

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